[redacted]

Supreme Court of the United States

[redacted]

No. [redacted] 51

A. LEO WEIL AND CHARLES H. WEIGEL, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & WEIGEL, PETITIONERS,

vs.

EDWARD H. STARR

[redacted]

[redacted]

[redacted]

[redacted]

(33,188)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 736

A. LEO WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. NEARY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX.

	Original	Print
Record from the district court of the United States, Southern New York	1	1
Writ of error	1	1
Record from supreme court of New York	3	2
Summons	3	2
Notice of appearance	4	2
Complaint	5	3
Notice of motion for order of removal	10	6
Petition for removal	11	7
Order granting motion for removal	15	9
Answer of defendant A. Leo Weil	16	9
Answer of defendant Charles M. Thorp	22	13
Amended complaint	30	17
Answer of A. Leo Weil to amended complaint	37	22
Answer of Charles M. Thorp to amended complaint	56	34

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 12, 1928

	Original	Print
Order substituting attorneys	75	46
Consent to substitution	76	46
Order of reference	77	47
Stipulation that cause be tried before referee	78	47
Opinion, Wardwell, referee	79	48
Defendants' exceptions to referee's proposed report	116	74
Defendants' proposed findings of fact and conclusions of law	138	90
Plaintiff's proposed findings of fact and conclusions of law	156	102
Report of referee	165	108
Defendants' exceptions	173	114
Order granting motion to confirm referee's report	215	144
Judgment	218	146
Petition for writ of error	220	146
Order allowing writ of error	222	147
Assignments of error	223	148
Bond on writ of error (omitted in printing)	258	
Citation (" " ")	260	
Clerk's certificates (" " ")	261	
Proceedings in United States circuit court of appeals, second circuit		
Opinion, Manton, J	263	175
Decree	263	175
Clerk's certificate	274	183
Order allowing certiorari	275	183
	276	185

[fols. a-1]

IN UNITED STATES DISTRICT COURT, SOUTHERN NEW YORK

Writ of Error

United States of America, ss:

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Edward M. Neary, Defendant in Error, Plaintiff below, and A. Leo Weil and Charles M. Thorp, Plaintiffs in Error, Defendants below, a manifest error hath happened, to the great damage of the said A. Leo Weil and Charles M. Thorp, as is said and appears by their complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 9th day of July, 1926, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit Court of Appeals for the Second Circuit may cause further [fol. 2] may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 10th day of June, in the year of our Lord one thousand nine hundred and twenty-six, and

of the Independence of the United States the one hundred and fiftieth.

Alex. Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed. Jno C. Knox, U. S. District Judge.

[fol. 3] In Supreme Court of New York, County of New York

Trial desired in the County of New York

Edward M. Neary, Plaintiff,

against

A. Leo Weil and Charles M. Thorp, Doing Business under the Firm Name and Style of Weil & Thorp, Defendants

Summons

To the above named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated City of New York, May 7th, 1921.

Guggenheimer, Untermeyer & Marshall, Plaintiff's Attorneys. Office and Post Office address: No. 120 Broadway, Borough of Manhattan, New York City.

[fol. 4] In Supreme Court of New York

[Title omitted]

Notice of Appearance

Sirs: Please to take notice that the defendant A. Leo Weil appears in this action, and that we are retained as

Attorneys for him therein, and demand that a copy of the Complaint and all papers in this action be served on us at our office, number 30 Broad Street, Borough of Manhattan, New York City.

Dated New York, May 26th, 1921.

Yours, &c., Crim & Wemple, Attorneys for Defendant Weil. Office and Post Office address: 30 Broad Street, Borough of Manhattan, New York City.

To Guggenheimer, Untermeyer & Marshall, Esqs., Plaintiff's Attorneys, 120 Broadway, New York City.

[fol. 5] In Supreme Court of New York

[Title omitted]

Complaint

The plaintiff above named complaining of the defendants herein, by Guggenheimer, Untermeyer & Marshall, his attorneys, alleges on information and belief:

First. At all the times hereinafter mentioned the defendants A. Leo Weil and Charles M. Thorp were copartners engaged in the practice of law in the City of Pittsburgh, Pennsylvania, under the firm name and style of Weil & Thorp. During all of said times Samuel Untermeyer, the plaintiff's assignor, was engaged in the practice of law at the City of New York.

Second. Prior to the month of August, 1917, the plaintiff's assignor had been retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pennsylvania, where he was engaged in business as a banker and in the operation of coal mines, to enable them to collect from the said Thompson [fol. 6] and out of his property his indebtedness to them, which amounted to many millions of dollars. The affairs of the said Thompson were greatly involved and it was agreed in the interests of his creditors and especially of those represented by plaintiff's assignor, that the extensive properties of the said Thompson should be conserved so

that they might be applied equitably in payment of the claims of his creditors.

Third. The plaintiff's assignor, acting under instructions of the creditors by whom he had been retained and believing that it would be necessary for the protection of all of the general creditors of the said Thompson that bankruptcy proceedings should be instituted against him in order to prevent the disruption and sacrifice of his estate, determined to institute such bankruptcy proceedings. To that end he informed the defendants of his plans in that regard and retained them to conduct such bankruptcy proceedings under his supervision, upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five thousand Dollars ($5,000).

Fourth. Upon the understanding and agreement aforesaid bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court of the United States for the Western District of Pennsylvania, for his adjudication as a bankrupt, and thereupon such proceedings were had that on or about September 10, 1917, the said Thompson was duly adjudicated a bankrupt and trustees of his estate were duly [fol. 7] appointed and the administration thereof proceeded, the defendants herein acting for plaintiff's assignor and the interests represented by him.

Fifth. In the course of the administration of the estate of the said Thompson various complications arose which prolonged the period of administration beyond that contemplated at the time of the institution of the aforesaid bankruptcy proceedings and which rendered it necessary for the defendants to perform more extensive and laborious services than it was originally believed to be necessary in the administration of the said estate in bankruptcy. Recognizing that fact plaintiff's assignor and the defendants thereupon agreed that the compensation of the letter for services in said bankruptcy proceedings was not to be limited to the sum of $5,000 as theretofore stipulated, and in lieu of the compensation originally stipulated it was agreed that the defendants were to receive for the services

rendered by them out of such allowance as should eventually be made by the Court in payment for such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him.

Sixth. Pursuant to such arrangement the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision of plaintiff's assignor, for which an allowance was on or about September 20, 1920, made to them in said proceedings by the District Court of the United States for the Western District of [fol. 8] Pennsylvania, to be paid out of the estate of the bankrupt, of the sum of One hundred and forty thousand Dollars ($140,000) in payment for the services rendered by them in said proceedings, and on or about November 15, 1920, said sum of $140,000 was paid to the defendants by the Trustees in Bankruptcy of the said Thompson.

Seventh. On being informed of such payment to the defendants, plaintiff's assignor, recognizing the nature and character of the services rendered by them in the aforesaid bankruptcy proceedings, determined that a fair and reasonable division of the said sum of $140,000 paid to the defendants as aforesaid was that the defendants should retain sixty per cent or Eighty-four thousand Dollars ($84,000) of the said sum, and that the remaining forty per cent or Fifty-six thousand Dollars ($56,000) were to be paid to him, and informed the defendants of his determination with respect to such division.

Eighth. Thereafter the defendants, although for a long time admitting and recognizing the rights of the plaintiff's assignor in the premises and seeking to induce him to make a larger allowance to them, refused to comply with the demands of the plaintiff's assignor that they pay over to him the said $56,000, and, although often requested to pay to him the said sum, have refused to pay the same or any part thereof and remain indebted therefor with interest from November 15, 1920.

Ninth. Prior to the commencement of this action plaintiff's assignor duly assigned and transferred to the plain- [fol. 9] tiff all of his right, title and interest in the cause

of action herein set forth, and the plaintiff is now the owner thereof.

Wherefore, the plaintiff demands judgment against the defendants for the sum of Fifty-six thousand Dollars ($56,000) with interest from November 15, 1920, besides the costs of this action.

Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiff. Office & Post Office address: 120 Broadway, Borough of Manhattan, New York City.

Duly sworn to by Edward M. Neary. Jurat omitted in printing.

[fol. 10] In Supreme Court of New York

[Title omitted]

Notice of Motion for Order of Removal

Please take notice, that upon the petition, and bond of A. Leo Weil, and the affidavit of John W. H. Crim, duly verified the 24th day of June, 1921, annexed hereto, and upon the Summons, Appearance and Complaint in this action, the undersigned will move this Court at a Special Term Part I to be held at the County Court House, Borough of Manhattan, New York City on the 30th day of June, 1921, at 10:15 o'clock in the forenoon, or as soon thereafter as counsel can be heard for an order granting the defendant's petition for the removal of this cause as prayed, and for such other or further relief as may be just.

Dated New York, June 25th, 1921.

Crim & Wemple, Attorneys for Defendant A. Leo Weil. Office & P. O. address: No. 30 Broad Street, Borough of Manhattan, New York City.

To Messrs. Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiff, No. 120 Broadway, New York City.

[fol. 11] In Supreme Court of New York

[Title omitted]

Petition for Removal

To the Honorable the Judges of the Supreme Court of the County and State of New York:

Your petitioner, A. Leo Weil, respectfully shows, that he is one of the defendants in the above entitled action; that the matter in dispute therein extends, exclusive of interest and costs, the sum and value of Three thousand ($3,000.00) Dollars.

Your petitioner further shows that the said suit is of a civil nature; that it is alleged in the Complaint that your petitioner and the defendant Charles M. Thorp, were retained to conduct bankruptcy proceedings under the supervision of plaintiff's assignor, Samuel Untermyer, against Josiah V. Thompson, who resided at Uniontown, Pennsylvania, and was engaged as a banker and in the operation of coal mines; and that thereupon such proceedings were had that on or about September 10th, 1917, the said Thompson [fol. 12] was duly adjudicated, trustees were appointed and the administration proceeded, the defendants acting for plaintiff's assignor and the interests represented by him. That in the course of the administration of the estate various complications arose which rendered it necessary for the defendants to perform more extensive services than was originally believed necessary in the administration of the estate in bankruptcy. That is was thereupon agreed that in lieu of the original compensation the said defendants were to receive out of the allowance made by the Court, such sum as was determined by the plaintiff's assignor to be just and equitable; that the Court allowed the defendant on or about September 20th, 1920, the sum of One hundred and forty thousand ($140,000.00) Dollars; that thereupon the plaintiff's assignor upon being informed of the payment of said allowance, determined that the defendant should retain sixty per cent. (60%) of the amount or Eighty-four thousand ($84,000.00) Dollars and that the remaining forty per cent. (40%) of Fifty-six thousand ($56,000.00) Dollars was to be paid to him; that defendants have refused to comply

to the demands of plaintiff's assignor, and that therefore plaintiff demands the amount above stated.

Your petitioner further shows that the said defendant your petitioner, was at the time of the commencement of this suit, and still is a citizen and resident of the State of Pennsylvania and a non-resident of the State of New York, and that the above named plaintiff's assignor, Samuel Untermyer, was at the time of the commencement of this suit, and still is a citizen and resident of the State of New York.

That the defendant, Charles M. Thorp, is a citizen and [fol. 13] resident of the State of Pennsylvania, but that neither the summons or other process herein was served upon him.

And there is a controversy which is wholly between citizens of different states, to wit: between A. Leo Weil, your petitioner, and the plaintiff's assignor, Samuel Untermyer.

Your petitioner offers herewith a bond with good and sufficient surety in the penal sum of Five hundred ($500.00) Dollars, conditioned for their entering in the United States District Court for the Southern District of New York on the first day of the next session of said Court, a copy of the record in this suit, and for paying all costs that may be awarded by said United States District Court, if said Court shall hold that the suit was wrongfully or improperly removed thereto.

That your petitioner has not answered, demurred or otherwise pleaded to the merits in this action, nor has the time of your petitioner as yet expired for so doing under the laws of the State of New York. That no other or previous petition or application has been made on behalf of your petitioner for the removal of this case to the United States District Court.

Your petitioner therefore prays this Honorable Court to proceed no further herein, except to make an order of removal as required by law, and to accept the said sureties and bond and to cause the record in this case to be removed into the said United States District Court for the Southern District of New York, according to the statute in such case made and provided, and your petitioner will ever pray.

Dated New York, June 24th, 1921.

A. Leo Weil, per John W. H. Crim.

[fol. 14] *Duly sworn to by John W. H. Crim. Jurat omitted in printing.*

[fol. 15] In Supreme Court of New York

[Title omitted]

Order Granting Motion for Removal

The following papers number 1 to 7 read on this motion this 30th day of June, 1921.

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-3
Filed Papers.....	4-7

Upon the foregoing papers this motion to remove this cause to the District Court of the United States for the Southern District of New York is granted on default. Bond approved.

V. M. D., J. S. C.

Dated June 30th, 1921.

[fol. 16] In United States District Court for the Southern District of New York

Edward M. Neary, Plaintiff,

against

A. Leo Weil and Charles M. Thorp, Doing Business under the Firm Name and Style of Weil & Thorp, Defendants

Answer of Defendant A. Leo Weil

The defendant A Leo Weil, by Crim & Wemple, his attorneys, answers the complaint herein as follows:

I. He admits the allegations contained in the First paragraph of the complaint, except that he denies that A. Leo Weil and Charles M. Thorp were copartners subsequent to November 30, 1920, and alleges that the firm of Weil & Thorp was dissolved as of the close of business on that day.

II. He admits the allegations contained in the Second paragraph of the complaint.

III. He admits the allegations contained in the Third paragraph of the complaint, except that he denies that the defendants were retained to conduct the bankruptcy proceedings referred to under the supervision of the plaintiff's assignor and denies that the defendants were retained to perform any services in said bankruptcy proceedings other [fol. 17] than to prepare and file the petition in bankruptcy and to take such proceedings therein as were necessary to obtain an adjudication in bankruptcy, and denies that the sum of five thousand dollars therein referred to was to cover any services except the proceedings aforesaid.

IV. Answering the allegations contained in the Fourth paragraph of the complaint he admits that bankruptcy proceedings were duly instituted on the petition of three of the creditors of Thompson in the District Court of the United States for the Western District of Pennsylvania for his adjudication as a bankrupt and that such proceedings were had that on or about September 10th, 1917, the said Thompson was duly adjudicated a bankrupt, and admits that thereafter Trustees of said Thompson's estate were duly appointed and the administration thereof proceeded. Except as aforesaid denies each and every allegation contained in the Fourth paragraph of the complaint.

V. He denies each and every allegation contained in the Fifth paragraph of the complaint, except that he admits that at the first meeting of the creditors of the Thompson estate in the proceedings in bankruptcy instituted as aforesaid Trustees were elected by the Creditors and that said Trustees appointed the defendant Weil & Thorp, together with the firm of Umbel, Robinson, McKean & Williams, of Uniontown, Pa., and W. H. Conaway, of Fairmont, West Virginia, their attorneys, which appointment was confirmed by the Referee in said bankruptcy proceedings, and that thereafter the defendants and the attorneys associated [fol. 18] with them as attorneys for the said Trustees continued over a period of several years to render services in the administration of the said bankrupt estate.

VI. He denies each and every allegation contained in the Sixth paragraph of the complaint, but admits that for the services rendered by the defendants Weil & Thorp, as attorneys for the Trustees of the bankrupt estate, allowances

were made from time to time by the District Court of the United States for the Western District of Pennsylvania to be paid out of the estate of the bankrupt, aggregating one hundred and forty thousand dollars ($140,000) and that a part of said sum of $140,000 was paid prior to November 15th, 1920, and the larger part thereof paid on or about said day.

VII. Answering the allegations contained in the Seventh paragraph of the complaint, he denies any knowledge or information thereof sufficient to form a belief, except that he admits that subsequent to November 15th, 1920, the plaintiff's assignor demanded that the defendants pay to him fifty-six thousand dollars ($56,000), being forty per cent. (40%) of the $140,000 received by them as attorneys for the Trustees of the bankrupt estate.

VIII. Answering the allegations contained in the Eighth paragraph of the complaint, he denies each and every allegation contained in said paragraph except that he admits that the defendants refused to comply with the demands of the plaintiff's assignor that they pay over to him the said [fol. 19] sum of fifty-six thousand dollars ($56,000), and still refuse to pay the same or any part thereof.

IX. Answering the allegations contained in the Ninth paragraph of the complaint, he denies any knowledge or information thereof sufficient to form a belief.

X. And further answering this defendant alleges:

The only services which the defendants were retained by plaintiff's assignor to perform in connection with the Thompson bankrupty proceedings were to prepare and file a petition in bankruptcy and to procure an adjudication in bankruptcy. The plaintiff's assignor informed the defendants at the time of said retainer that a contract or agreement had been made for the sale of the properties and that the sale under said contract or agreement would be consummated before or at the time of the adjudication in bankruptcy and that there would be no necessity for an administration of the estate in the bankruptcy court. The contemplated sale did not take place before or at the time of the adjudication in bankruptcy and in fact never took place. After the adjudication in bankruptcy had been ob-

tained a first meeting of the creditors was held in regular course at which Trustees in bankruptcy were elected, the Trustees so elected appointed the defendants and the firm of Umbel, Robinson, McKean & Williams, of Uniontown, Pa., and W. H. Conaway, of Fairmont, West Virginia, their attorneys. The administration of said bankrupt estate lasted [fol. 20] for several years and is not yet fully completed. Said administration involved many and very large transactions and required the performance of continued and arduous legal services, including the prosecution and defense of a great number of actions and proceedings in many different courts both in the States of Pennsylvania and West Virginia, the said Thompson estate including many hundreds of thousands of acres of coal lands in West Virginia and Pennsylvania having a value of many millions of dollars and being subject to mortgages and other liens aggregating upwards of thirty million dollars ($30,000,000). The defendants and other attorneys for the Trustees performed the aforesaid legal services and in the performance thereof acted solely as attorneys for the Trustees. The plaintiff's assignor did not participate in the performance of any of said services and was not consulted in regard thereto and was not retained or employed by the Trustees in bankruptcy in any manner whatsoever. The defendants did not act under the direction or supervision of the plaintiff's assignor nor was there any agreement or understanding between the defendants and plaintiff's assignor that plaintiff's assignor was to have any interest in the compensation received by the defendants for the services performed by them for the Trustees of the bankrupt estate. The plaintiff's assignor never suggested any such agreement to the defendants and no such agreement was ever considered or discussed by the defendants. Any such agreement, if entered into, would have been wholly contrary to public policy unprofessional, illegal and void. [fol. 21] Wherefore this defendant asks that the complaint be dismissed with costs.

Crim & Wemple, Attorneys for Defendant A. Leo Weil. Office and P. O. address: 30 Broad Street, Borough of Manhattan, New York City. Carter, Leslyard & Milburn, of Counsel. Office and P. O. address: 54 Wall Street, Borough of Manhattan, New York City.

Duly sworn to by A. Leo Weil. Jurat omitted in printing.

[fol. 22] In United States District Court

[Title omitted]

Answer of Defendant Charles M. Thorp

The defendant, Charles M. Thorp, by Crim & Wemple, his attorneys, answers the complaint herein as follows:

First. He admits the allegations contained in the first paragraph of the complaint, except that he denies that A. Leo Weil and Charles M. Thorp were co-partners subsequent to November 30, 1920, and alleges that the firm of Weil & Thorp was dissolved at the close of business on that day.

Second. He denies the allegations contained in the second paragraph of the complaint, except that he admits that Samuel Untermyer had been retained as attorney and counsel for a large number of creditors of Josiah V. Thompson, whose affairs were greatly involved. As defendant is informed and believes, said creditors were organized and were represented by and acting through a Creditors' Committee, and said Samuel Untermyer was acting for and [fol. 23] under the instructions of said Creditors' Committee.

Third. He denies the allegations of the third paragraph of the complaint, except that he admits that it was determined that bankruptcy proceedings should be instituted against said Thompson and the defendants were retained to institute such proceedings. At that time, as defendant is informed and believes, negotiations were pending looking to a sale of said Thompson's property and it was believed that said sale would be consummated in a short time and that in consequence the bankruptcy proceedings would be of short duration and the defendants were retained to prepare and file a petition in bankruptcy and to take such proceedings therein as were necessary to obtain an adjudication in bankruptcy, and it was agreed that $5,000 would be reasonable compensation for the services which would be required.

Fourth. He denies the allegations contained in the fourth paragraph of the complaint. It is true that upon the understanding set forth in the third paragraph of this answer bankruptcy proceedings were instituted on the petition of certain creditors of said Thompson in the District Court of the United States for the Western District of Pennsylvania, for his adjudication as a bankrupt, and that thereupon such proceedings were had; that on or about September 10, 1917, said Thompson was duly adjudicated a bankrupt; and it is true that thereafter trustees of his estate were duly appointed and the administration thereof proceeded. Instead of said proceedings being of short duration they lasted for over three years and have not in fact yet been completed.

[fol. 24] Fifth. He denies the allegations contained in the fifth paragraph of the complaint, except that he admits that at the first meeting of the creditors of said Thompson in the proceedings in bankruptcy trustees were elected by the creditors. Said trustees in bankruptcy appointed the defendants Weil & Thorp, together with the firm of Umber, Robinson, McKean & Williams, of Uniontown, Pa., and W. H. Conaway of Fairmont, W. Va., their attorneys, which appointment was confirmed by the Referee in Bankruptcy, and thereafter the defendants and the attorneys associated with them as attorneys for said trustees, rendered services in the administration of said bankrupt estate, continuing to do so for a period of over three years. The services so rendered were rendered by the defendants in the due and proper administration of the bankrupt estate and by virtue of their appointment as attorneys for the trustees in bankruptcy, and the defendants were entitled to receive for their services such allowance as should eventually be made by the Court in payment for such services. It is not true that defendants at any time under any circumstances agreed with Samuel Untermyer that they were to receive for the services rendered by them only such sum as said Samuel Untermyer should consider just and equitable, and that the remainder of the amount allowed by the Court in payment for such service should be payable to him the said Samuel Untermyer. This defendant never made any such agreement with said Samuel Untermyer and never knew that Samuel Untermyer claimed that there was any

such an agreement until this suit was brought; and upon information and belief this defendant avers that the other [fol. 25] defendant, A. Leo Weil, never made any such agreement. And defendant avers that any such agreement would have been without consideration, contrary to public policy, unprofessional, illegal and void.

Sixth. He denies the allegations of the sixth paragraph of the complaint, except that he admits that for the services rendered by the defendants as attorney for the trustees of the bankrupt estate allowances were made from time to time by the District Court of the United States for the Western District of Pennsylvania of amounts to be paid out of the estate of the bankrupt aggregating $140,000. A part of said sum was paid prior to November 15, 1920, and the larger part thereof on or about that day.

Seventh. He denies the allegations of the seventh paragraph of the complaint, except that he admits that subsequent to November 15, 1920, said Samuel Untermyer demanded that the defendants pay to him $50,000 out of the amounts received by them for their services as attorneys for the trustees of the bankrupt estate.

Eighth. He denies the averments of the eighth paragraph of the complaint, except that he admits that defendants refused to comply with the demands of said Samuel Untermyer to pay him said sum of $50,000, and still refuse to comply with the same.

Ninth. The defendant has no information or knowledge with regard to the allegations of the ninth paragraph of the [fol. 26] complaint sufficient to form a belief, and therefore does not admit said allegations, but calls upon the plaintiff to prove the same.

Tenth. For further answer this defendant, upon information and belief, alleges that the only services which the defendants were originally retained by said Creditors Committee to perform in connection with the Thompson bankruptcy proceedings, were to prepare and file a petition in bankruptcy and to prosecute the same to an adjudication in bankruptcy; that at the time of said retainer said Samuel Untermyer informed the defendants that negotiations were pending for the sale of the properties of said Thomp-

son and that a sale thereunder should be consummated before or at the time of the adjudication in bankruptcy, and there would be in consequence no necessity for the administration of the estate in Bankruptcy Court; that the contemplated sale did not take place; that the bankruptcy proceedings were prosecuted to an adjudication; that after the adjudication a first meeting of the creditors was held in regular course at which trustees in bankruptcy were elected and the trustees so elected appointed the defendants and the firm of Umbel, Robinson, McKean & Williams, of Uniontown, Pa., and W. H. Conaway, of Fairmont, W. Va., their attorneys, and thereafter the defendants represented and acted solely for said trustees; that the administration of said bankrupt estate lasted for over three years and is not yet fully completed; that said administration involved many and very large transactions and required the performance of continuous and arduous legal services, includ-
[fol. 27] ing the prosecution and defense of a great number of actions and proceedings in many different courts both in the states of Pennsylvania and West Virginia, said Thompson estate including hundreds of thousands of acres of coal lands in West Virginia and Pennsylvania, having a value of many millions of dollars, and being subject to mortgages and other liens aggregating upwards of thirty million dollars; that the defendants and the other attorneys for the trustees performed said legal services and in the performance thereof acted solely as attorneys for the trustees; that said Samuel Untermyer did not participate in the performance of any of said services and was not consulted in regard thereto nor employed by the trustees in bankruptcy in any manner whatsoever; that the defendants did not act under the direction or supervision of said Samuel Untermyer; that said Samuel Untermyer was originally and continued to be counsel for said Creditors Committee, and has received or will receive ample compensation through said Committee; that there never was any agreement or understanding between the defendants and said Samuel Untermyer that the latter was to have any interest in the compensation received by the defendants for the services performed by them for the trustees of the bankrupt estate; that the said Samuel Untermyer never suggested any such agreement to the defendants and no such agreement was

ever considered or discussed by them; and that any such agreement if entered into would have been without consideration, contrary to public policy, unprofessional, illegal and void.

[fol. 28] Eleventh. And for further answer this defendant upon information and belief alleges that said Samuel Untermyer represented and acted as counsel for said Creditors' Committee, and that when a final sale and disposition of the property of the bankrupt was made it was provided in and by the contract of sale that the purchaser of the property should pay a very large sum, to wit, three hundred sixty thousand dollars, in addition to the purchase price, to cover the compensation and expenses of the Creditors' Committee and its counsel; that as defendant is informed and believes, said Creditors' Committee and its counsel were to make no claim upon the fund realized from said sale but were to look wholly to said $360,000 for their compensation; and that said Samuel Untermyer has claimed and received, or will receive, out of said sum of three hundred sixty thousand dollars a very large proportion thereof as compensation for his services to said Creditors' Committee.

Wherefore this defendant asks that the complaint be dismissed with costs.

Crim & Womple, Attorneys for Defendant Charles M. Thorp.

[fol. 29] *Duly sworn to by Charles M. Thorp. Jurat omitted in printing.*

[fol. 30] In United States District Court

[Title omitted]

Amended Complaint

The plaintiff, by Guggenheimer, Untermyer & Marshall, his attorneys, complaining of the defendants as and for an amended complaint, alleges on information and belief:

First. At all the times hereinafter mentioned the defendants, A. Leo Weil and Charles M. Thorp, were copartners,

engaged in the practice of law in the City of Pittsburgh, Pennsylvania, under the firm name and style of Weil & Thorp. During all of said times Samuel Untermyer, the plaintiff's assignor, was engaged in the practice of law in the City of New York.

Second. Prior to the month of August, 1917, the plaintiff's assignor had been retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pennsylvania, where he was [fol. 31] engaged in business as a banker and in the operation of coal mines, to enable them to collect from the said Thompson and out of his property his indebtedness to them, which amounted to many millions of dollars. The affairs of the said Thompson were greatly involved and it was agreed in the interests of his creditors and especially of those represented by plaintiff's assignor, that the extensive properties of the said Thompson should be conserved so that they might be applied equitably in the payment of the claims of his creditors.

Third. The plaintiff's assignor, acting under instructions of the creditors, by whom he had been retained, and believing that it would be necessary for the protection of all of the general creditors of the said Thompson that bankruptcy proceedings should be instituted against him in order to prevent the disruption and sacrifice of his estate, determined to institute such bankruptcy proceedings. To that end he informed the defendants of his plans in that regard and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five Thousand Dollars ($5,000.00).

Fourth. Upon the understanding and agreement aforesaid, bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court of the United States for the Western [fol. 32] District of Pennsylvania for his adjudication as a bankrupt, and thereupon such proceedings were had that on or about September 10, 1917, the said Thompson was duly adjudicated a bankrupt, and trustees of his estate

were duly appointed and the administration thereof proceeded, the defendants herein acting for plaintiff's assignor and the interests represented by him.

Fifth. In the course of the administration of the estate of the said Thompson, various complications arose which prolonged the period of the administration of the estate beyond that contemplated at the time of the institution of the aforesaid bankruptcy proceedings and which rendered it necessary for the defendants and the plaintiff's assignor and the firm of lawyers with which he was and is associated together to perform more extensive and laborious services than it was originally believed to be necessary for the defendants to perform in the administration of the said estate in bankruptcy. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that the plaintiff's assignor and the firm with which he was associated should together perform such services and that the compensation of the defendants for services in said bankruptcy proceedings was not to be limited to the sum of Five Thousand Dollars ($5,000.00) as theretofore stipulated, and in lieu of the compensation originally stipulated it was agreed that the plaintiff's assignor and the firm of lawyers with which he was associated should collaborate with the defendants under the direction of the former in the performance of such services, and that the defendants [fol. 33] were to receive for the services rendered by them out of such allowance as should eventually be made by the Court in payment for such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him.

Sixth. Pursuant to such arrangement the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision of plaintiff's assignor and with the active aid of the latter and of the firm with which he was associated, for which allowances were made to the defendants from time to time in said proceedings by the District Court of the United States for the Western District of Pennsylvania on or about September 3, 1918, July 2, 1919, and July 18, 1919, in the total sum of Thirty Thousand five hundred Dollars ($30,500.00), on or about June 1, 1920, in the sum of Forty-

five Thousand three hundred and sixty-six Dollars and sixty-six cents ($45,366.66), on or about October 27, 1920, in the sum of Sixty-eight Thousand and ninety-three Dollars and thirty-two cents ($68,093.32), on or about November 30, 1920, in the sum of Twenty-one thousand Dollars ($21,000.00), and on or about May 10, 1924, in the sum of Twenty-three Thousand three hundred and thirty-three Dollars and thirty-one cents ($23,333.31), amounting to the total sum of One Hundred and eighty-eight Thousand and two hundred and ninety-three Dollars and twenty-nine cents ($188,293.29), to be paid out of the estate of the bankrupt in payment for the services rendered by [fol. 34] the defendants in said proceedings, and on or about the dates hereinbefore set forth payments were received by the defendants in the amounts above set forth, together aggregating said sum of $188,293.29, were paid to the defendants by the Trustees in Bankruptcy of the said Thompson. A substantial part of the services for which said allowances were made was performed by the plaintiff's assignor and by the said firm with which he was and is associated.

Seventh. It is the intention of the defendants to make a further application for a further and additional allowance to them in payment for the services rendered by them in said proceedings to be payable out of the estate of the bankrupt when said bankruptcy proceedings are concluded, as to which if and when and to the extent allowed, plaintiff claims that the above-stated agreement will also apply.

Eighth. On being informed of such payments to the defendants, plaintiff's assignor, recognizing the aforesaid agreement and the nature and character of the services rendered by them in the aforesaid bankruptcy proceedings, determined that a fair and reasonable division of the said sum of $188,293.29 paid to the defendants as aforesaid, and of any further sums to be allowed the defendants in said proceedings, was that the defendants should retain sixty per cent. (60%) of the said sums received by them and of any further sums allowed them in said proceedings, and that the remaining forty per cent. (40%) was to be paid to him, and informed the defendants of his determination with respect to such division.

[fol. 35] Ninth. Thereafter, the defendants, although for a long time admitting and recognizing the rights of the plaintiff's assignor in the premises and seeking to induce him to make a larger allowance to them, refused to comply with the demands of plaintiff's assignor that they pay over to him forty per cent. (40%) of the sum so received by them, and, although often requested to pay to him the said sum, have refused to pay the same or any part thereof, and remain indebted therefor with interest on $12,200 from September 3, 1918, July 2, 1919, and July 18, 1919, according to the respective amounts received by the defendants on said dates; on $18,146.66 from June 1, 1920; on $26,717.33 from October 27, 1920; on $8,400 from November 30, 1920; and on $9,333.32 from May 10, 1924.

Tenth. Prior to the commencement of this action, plaintiff's assignor duly assigned and transferred to the plaintiff all of his right, title and interest in the cause of action herein set forth and the plaintiff is now the owner thereof.

Wherefore, the plaintiff demands judgment against the defendants for the sum of $75,317.31, with interest as follows: from September 3, 1918, July 2, 1919, and July 18, 1919, on $12,200 thereof, according to the respective amounts received by the defendants on said dates; from June 1, 1920, on $18,146.66; from October 27, 1920, on $27,237.33; from November 30, 1920, on $8,400; and from May 10, 1924, on $9,333.32; and for forty per cent. (40%) of any and all further and additional allowances granted the defendants in said proceedings as and when received by the [fol. 36] defendants; together with the costs and disbursements of this action.

Guggenheimer, Untermyer & Marshall, Attorneys
Plaintiff. Office and Post Office address: 120 Broadway, Borough of Manhattan, City of New York, N. Y.

Duly sworn to by Edward M Neary. Jurat omitted in printing.

[fol. 37] In United States District Court

[Title omitted]

Answer of A. Leo Weil to Amended Complaint

The defendant A. Leo Weil, by Stien & Salant, his attorneys, answers the amended complaint herein as follows:

1. He denies the allegation contained in the subdivision of the said amended complaint marked "First," that at all the times therein mentioned the defendants were copartners engaged in the practice of law in the City of Pittsburgh, Pennsylvania, under the firm name and style of Weil & Thorp; and he alleges in connection therewith that the defendants were such copartners until on or about the 1st day of December, 1920, but not thereafter.

2. He admits, upon information and belief, each and every of the allegations contained in the subdivision of the said amended complaint marked "Second."

[fol. 38] 3. He admits, upon information and belief, the allegation contained in the subdivision of the said amended complaint marked "Third", that the plaintiff's alleged assignor, acting under instructions of the creditors by whom he had been retained, and believing that it would be necessary for the protection of all of the general creditors of the said Thompson that bankruptcy proceedings should be instituted against him in order to prevent the disruption and sacrifice of his estate, determined to institute such bankruptcy proceedings. He admits the further allegation in said subdivision contained that to that end the plaintiff's alleged assignor informed the defendants of his plans in that regard and retained the defendants. He denies each and every other allegation in said subdivision contained, and he alleges in connection therewith, that plaintiff's alleged assignor retained the defendants under the following circumstances and solely for the following limited and specific purposes and no others to wit:—Plaintiff's alleged assignor was at that time negotiating a sale of said Thompson's entire property or the greater bulk thereof, and plaintiff's alleged assignor was of the opinion and so stated to defendants, that the said sale would shortly be

consummated and would meet with the approval of all the creditors of the said Thompson and that the bankruptcy proceedings would therefore be of short duration and would not go beyond an adjudication in bankruptcy or a composition in bankruptcy. Plaintiff's alleged assignor accordingly retained defendants to present and file an involuntary petition in bankruptcy against the said Thompson, to procure an adjudication that the said Thompson was a bankrupt, and to conduct the said bankruptcy proceedings and all proceedings that might be necessary and [fol. 39] advisable in connection therewith for the purpose of preventing the disintegration of the said Thompson's estate until such adjudication or until the contemplated composition was effected, all of which was to be conducted under the supervision of the plaintiff's alleged assignor. He further alleges in connection therewith that plaintiff's alleged assignor so retained the defendants under an understanding and agreement whereby the defendants were to be paid and were to receive from the plaintiff's assignor in compensation for the services so to be rendered by them the sum of Five thousand ($5,000) Dollars or such other sum as plaintiff's alleged assignor might fix in the event that the services so rendered should be more extensive than were then contemplated.

4. He admits the allegation contained in the subdivision of the said amended complaint marked "Fourth", that bankruptcy proceedings were duly instituted on the petition of three of the creditors of said Thompson in the District Court of the United States for the Western District of Pennsylvania, for his adjudication as a bankrupt, and he admits the further allegation in said subdivision contained that thereupon such proceedings were had that on or about September 10, 1917 the said Thompson was duly adjudicated a bankrupt. He alleges in connection therewith that the said negotiations of plaintiff's alleged assignor for the sale of the said Thompson's entire property or the greater bulk thereof were not consummated either then or at any other time, that the contemplated composition was not effected, that it therefore became necessary to elect or appoint a trustee or trustees in bankruptcy in regular course, and that thereupon and at the request [fol. 40] of plaintiff's alleged assignor the defendants

attempted in conjunction with the plaintiff's alleged assignor to secure the election and appointment of one George R. Scrugham as sole trustee; thereupon and at a meeting of creditors duly held three trustees were elected and appointed of the said Thompson's estate in bankruptcy, the said trustees duly designated the defendants as their general counsel, and Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr. Waitman H. Conaway of Fairmont, West Virginia, as associate counsel, and the said designations were duly ratified and confirmed by the District Court of the United States for the Western District of Pennsylvania. He admits that up to the time of the election and appointment of the said three trustees as aforesaid the defendants acted for the plaintiff's alleged assignor and for the interests represented by him, to wit, a certain committee of the creditors of the said Thompson known as the Creditors' Committee, both in presenting and filing the petition in bankruptcy and in securing the adjudication in bankruptcy and in endeavoring to secure the election and appointment of the said sole trustee, and he further admits that in rendering the said services the defendants acted under the supervision and direction of the plaintiff's alleged assignor; but he emphatically denies that from and after the election and appointment as aforesaid of the said three trustees the defendants at any time acted for the plaintiff's alleged assignor or for the interests represented by him or under the direction or supervision of the plaintiff's alleged assignor, or under or pursuant to any agreement or understanding, express or implied, with the plaintiff's alleged assignor; and he al- [fol. 41] leges, on the contrary, that upon the election and appointment of the said three trustees as aforesaid and the designation and confirmation of the defendants as general counsel to the trustees as aforesaid, the retainer and employment of the defendants by the plaintiff's alleged assignor and the interests represented by him was fulfilled and terminated and came to and end, and that from that time forth the defendants acted in all matters connected with the said bankruptcy estate solely by virtue of and under and pursuant to their said designation and confirmation as general counsel to the trustees and as officers duly appointed of the Court, and not otherwise.

He denies each and every allegation in said subdivision contained not hereinbefore expressly admitted or denied.

5. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked "Fifth", except that he admits that between the presentment and filing of the petition in bankruptcy by the defendants and the appointment of the trustees, various complications arose which rendered it necessary for the defendants to perform during the said period more extensive and laborious services under the supervision of the plaintiff's alleged assignor than it was originally believed would be necessary for the defendants to perform during the said period, and except that he further admits that, recognizing that fact, plaintiff's alleged assignor and the defendants thereupon agreed that the compensation of the defendants for services in said bankruptcy proceedings up to the time of the appointment of the trustees was not to be limited to the sum of Five thousand ($5,000) Dollars. [fol. 42] And he specifically denies that there was any agreement, express or implied, between the plaintiff's alleged assignor and the defendants regarding the performance of services by the defendants after the appointment of the trustees in bankruptcy, or regarding the compensation of the defendants for services performed by them after the appointment of the trustees in bankruptcy, or regarding any collaboration of the defendants with the plaintiff's alleged assignor and the firm of lawyers with which he was associated in the performance of services after the appointment of the said trustees, and he further specifically denies that there was any agreement, express or implied, between the plaintiff's alleged assignor and the defendants whereby the defendants were to receive for the services rendered by them after the appointment of the trustees such sum as plaintiff's alleged assignor might consider just and equitable, the remainder of any amount allowed to them to be payable to plaintiff's alleged assignor. And he further alleges that the services rendered by the defendants after their designation and confirmation as general counsel to the trustees were rendered in collaboration with the associate counsel to the said trustees duly designated and confirmed, to wit, Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr.

Waitman H. Conaway of Fairmont, West Virginia, and not in collaboration with or under the direction of plaintiff's alleged assignor or the firm with which he was connected, and that any and all services rendered by plaintiff's alleged assignor and his said firm were rendered as counsel to the Creditors' Committee aforesaid and not otherwise. And he not only denies that there was ever any such agree- [fol. 43] ment or understanding contemplated, or made, or even suggested, as that claimed by plaintiff, but he alleged that any such agreement or understanding would have been unprofessional, contrary to public policy, a fraud upon the trustees and the Court appointing and confirming the defendants as general counsel to the trustees, and illegal, null and void.

6. He admits the allegation contained in the subdivision of the said amended complaint marked "Sixth", that the defendants continued to render services in the said bankruptcy proceedings, for which allowances were made to the defendants from time to time in said proceedings by the District Court of the United States for the Western District of Pennsylvania on or about September 3, 1918, July 2, 1919 and July 18, 1919, in the total sum of $30,500.00, on or about June 1, 1920 in the sum of $45,366.66, and on or about October 27, 1920 in the sum of $68,093.32, to be paid out of the estate of the bankrupt in payment for the services rendered by the defendants in said proceedings, and on or about the said dates payments were received by the defendants in the amounts above set forth, but he denies each and every other allegation in said subdivision contained; and he alleges in connection therewith the sum of $21,000.00 allowed and paid on or about November 30, 1921 and not on or about November 30, 1920, as alleged in the said amended complaint) and the further sum of $23,333.31 allowed and paid on or about May 10, 1924, were so allowed and paid to the defendant A. Leo Weil solely for services rendered by him after the dissolution of the firm of Weil & Thorp, and that neither the said firm nor the defendant Charles M. Thorp participated in the said al- [fol. 44] allowances nor in the services for which the said allowances were made.

7. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked

"Seventh," and alleges, in connection therewith, that it is the intention of the defendant A. Leo Weil to make a further application for a further and additional allowance to him in payment for the services rendered by him in said proceedings, to be payable out of the estate of the bankrupt when said bankruptcy proceedings are concluded.

8. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked "Eighth," and he alleges, in connection therewith, that the plaintiff's alleged assignor in or about the year 1920 made a demand wholly without right, basis or justification, that the defendants pay to him forty (40%) per cent of all sums theretofore allowed to and received by them from the said bankruptcy estate.

9. He admits the allegation contained in the subdivision of the said amended complaint marked "Ninth," that the defendants refused to comply with the demands of plaintiff's assignor that they pay over to him forty (40%) per cent of the sums received by them, and he admits the further allegation in said subdivision contained that the defendants refused, after request, to pay the same, but he denies each and every other allegation in said subdivision contained.

10. He denies that he has any knowledge or information thereof sufficient to form a belief as to each and every of [fol. 45] the allegations contained in the subdivision of the said amended complaint marked "Tenth."

Further answering the said amended complaint, and for a separate and distinct defense thereto, the defendant A. Leo Weil alleges as follows:

11. In or about the month of August, 1917, plaintiff's alleged assignor retained and employed defendants to present and file an involuntary petition in bankruptcy against Josiah W. Thompson, to procure an adjudication that the said Thompson was a bankrupt, and to conduct the said bankruptcy proceedings and all proceedings that might be necessary and advisable in connection therewith for the purpose of preventing the disintegration of the estate of the said Thompson until such adjudication or until a contemplated composition was effected. Plaintiff's alleged as-

signor was at said time negotiating a sale of said Thompson's entire property or the greater bulk thereof, and plaintiff's alleged assignor was of the opinion and so stated to defendants that the said sale would shortly be consummated and would meet with the approval of all the creditors of the said Thompson and that the bankruptcy proceedings would therefore be of short duration and would not go beyond an adjudication in bankruptcy or a composition in bankruptcy. Defendants accepted the said retainer and employment for the limited and specific purposes above stated under and pursuant to an agreement between plaintiff's alleged assignor and defendants, whereby defendants were to perform the said services under the supervision and direction [fol. 46] of plaintiff's alleged assignor, and were to be paid in compensation therefor by plaintiff's alleged assignor, the sum of Five thousand ($5,000) Dollars, or such other sum as plaintiff's alleged assignor might fix in the event that the services rendered should be more extensive than were then contemplated.

12. Thereupon and pursuant to the said retainer and employment defendants, acting under the supervision and direction of plaintiff's alleged assignor did duly present and file an involuntary petition in bankruptcy against the said Thompson in the District Court of the United States for the Western District of Pennsylvania, did duly procure on or about the 10th day of September, 1917, an adjudication that the said Thompson was a bankrupt, and did duly perform extensive and laborious services in various proceedings to prevent the disintegration of the estate of the said Thompson. The said sale of the entire property or the greater bulk thereof of the said Thompson failed of consummation and it became necessary to elect and appoint a trustee or trustees of the said Thompson's estate in bankruptcy in regular course. Thereupon and at the request of plaintiff's alleged assignor defendants performed further services for plaintiff's alleged assignor in endeavoring to procure the election and appointment of one George R. Scrugham as sole trustee. At a meeting duly held of the creditors of the said Thompson three trustees were duly elected and appointed on or about the 17th day of October, 1917. Thereupon and pursuant to the retainer and employ-

ment aforesaid, the said retainer and employment was fulfilled and the same terminated and came to an end.
[fol. 47] The services so rendered as aforesaid by defendants under the said retainer and employment and at the request of plaintiff's alleged assignor were more extensive and laborious than had been contemplated by plaintiff's alleged assignor and defendants at the time of the said retainer and employment, and it was thereupon agreed that defendants should not be limited in their compensation for the said services to the sum of Five thousand ($5,000) Dollars.

13. Upon the election and appointment of the trustees in bankruptcy as aforesaid, the said trustee in bankruptcy duly designated, and the said District Court duly ratified and confirmed the designation of, the defendants as general counsel for the said trustees in bankruptcy, and Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr. Waitman H. Conaway of Fairmont, West Virginia, as associate counsel for the said trustee. Thereupon and pursuant to their said designation as general counsel to the trustees, the defendants proceeded to render and did continue to render services as such general counsel to the trustees in connection with the said bankruptcy estate until on or about the 1st day of December, 1920, when the co-partnership of the defendants was terminated, and from and after said latter date the defendant A. Leo Weil has continued to render and is now rendering services as general counsel to the said trustees in connection with the said estate.

From and after the designation as aforesaid of the defendants as general counsel for the said trustees, all of the [fol. 48] services rendered by the defendants up to on or about the 1st day of December, 1920, and thereafter all the services rendered by the defendant A. Leo Weil in connection with the said estate, have been rendered pursuant to the said designation and as officers of the Court, and the same have not been rendered under or pursuant to any agreement or understanding of any kind or nature whatsoever, express or implied, with the plaintiff's alleged assignor, or with any other person or persons whatsoever.

14. Immediately after the election and appointment of the said trustees in bankruptcy and the designation by them and the approval by the said District Court of their said counsel, the said trustees and their said counsel proceeded to conclude the sale of that portion of the bankrupt's estate involved in what is known as the Frick sale. Most of the substantial terms of the said Frick sale had, however, been negotiated prior to the appointment of the said trustees by the said Creditors' Committee and by plaintiff's alleged assignor as its counsel.

Upon the consummation of the said Frick sale it was determined to make an application for counsel fees out of the proceeds of the said sale for services rendered in connection therewith. Thereupon, and having in mind that most of the substantial terms of the said sale had been actually negotiated as aforesaid by the said Creditors' Committee and the plaintiff's alleged assignor as its counsel, and having further in mind that the plaintiff's alleged assignor had as yet received no compensation for the services rendered by him in connection with the estate of the said Thompson, the said general and associate counsel to the [fol. 49] trustees and the firm with which plaintiff's alleged assignor was associated, pursuant to agreement among all of them, presented a joint petition and application for counsel fees to be paid to them jointly out of the proceeds of the said Frick sale for services rendered in connection therewith. The said petition and application was duly granted and an allowance was duly made out of the proceeds of the said Frick sale for counsel fees to the said petitioners and applicants jointly for services rendered in connection with the said sale. After a division of the counsel fees so allowed between defendants, on the one hand, and the associate counsel to the trustee, on the other hand, the defendants offered to plaintiff's alleged assignor to pay to him for the firm with which he was associated, to wit, Guggenheimer, Untermeyer & Marshall, whatever proportion he desired out of the balance left to be divided between the defendants and the said firm, and the defendants repeatedly requested plaintiff's alleged assignor to fix and name the proportion that he desired, but the plaintiff's alleged assignor did not do so at any time prior to the commencement of this action and has not done so even up to the present time.

15. At or about the time of the petition and application for the said fees from the said Frick sale, and in or about the month of May, 1918, a serious and personal disagreement, arising out of a matter not connected with the said Thompson estate, occurred between the plaintiff's alleged assignor and the defendant A. Leo Weil, of such a nature as to make further personal relations between them impossible, and it was thereupon agreed between the plaintiff's [fol. 50] alleged assignor and the defendant A. Leo Weil that they and their respective firms should have no further professional relationship of any kind with each other.

16. The administration in bankruptcy of the said Thompson estate by the trustees and by their counsel continued, further sales of small portions of the estate were negotiated and made by the trustees and their said counsel, and in or about the month of June, 1919, the sale of the entire remainder of the said estate, constituting the bulk thereof, was negotiated and made by the trustees and their counsel to the Piedmont Coal Company under a contract approved, among others, by the said Creditors' Committee and by the plaintiff's alleged assignor as its counsel, wherein and whereby it was provided that the purchaser, in addition to paying to the trustees in bankruptcy the purchase price therein named, would also pay to the said Creditors' Committee in full for the services of the said Creditors' Committee and its counsel, i. e., plaintiff's alleged assignor, prior to the bankruptcy and for such assistance as the said Creditors' Committee and its said counsel may have rendered to the trustees since the adjudication in bankruptcy, an amount not exceeding the sum of $360,000.00. The said contract of purchase and sale was duly ratified and approved by the said District Court, and the purchaser did thereupon pay to the said Creditors' Committee, pursuant thereto, the sum of $360,000.00 or the greater part of the said sum, and the plaintiff's assignor has received and will receive from the said sum a large amount of money in full for any and all services rendered by plaintiff's alleged assignor in connection with the estate of the said Thompson, both before the adjudication in bankruptcy and subsequent thereto.

[fol. 51] Plaintiff's alleged assignor and the firm with which he was connected did not then or thereafter prior

to the commencement of this action make any claim, nor has plaintiff in this action made any claim, upon defendants for any part of the fees received as aforesaid by defendants in connection with and out of the Frick sale, and defendants did not therefore demand from plaintiff's alleged assignor prior to the commencement of this action, and have not demanded in this action, compensation for the services rendered by them as aforesaid prior to the election and appointment of the trustees in bankruptcy.

17. Any and all services rendered by plaintiff's alleged assignor in connection with the estate of the said Thompson were so rendered, both before the adjudication in bankruptcy and after the said adjudication, as counsel to the said Creditors' Committee and not otherwise.

On the other hand, from and after the designation of the defendants as general counsel to the said trustees, any and all services rendered by the defendants as a partnership and thereafter by the defendant A. Leo Weil solely in connection with the estate of the said Thompson were so rendered as such general counsel to the trustees and not otherwise, and any and all fees and allowances paid out of the bankrupt estate to the defendants as a partnership and to the defendant A. Leo Weil, and to Messrs. Umbel, Robinson, McKean & Williams and to Mr. Waitman H. Conaway, were, except as to the said Frick fees, allowed and paid for services rendered by them solely as general and associate counsel to the trustees, and were not allowed or paid for any services rendered in whole or in part by plaintiff's alleged assignor or by the firm with which he was connected, and the said [fol. 52] fees were allowed and paid, as plaintiff's assignor and his representatives should have known and did well know, only after sworn proof had been submitted to the Court that the services for which the same were allowed and paid had been rendered by the said general and associate counsel to the trustees and not by any other person or persons whatsoever.

In performing the said services, the defendants as a partnership and thereafter the defendant A. Leo Weil acted solely for the said trustees, and did not act for the plaintiff's alleged assignor, nor for the interests represented by him, nor did they act under the supervision or direction of or in collaboration with the plaintiff's alleged assignor,

nor was there any agreement or understanding, expess or implied, that defendants as a partnership or defendant A. Leo Weil as general counsel to the trustees would act for plaintiff's alleged assignor or for the interests represented by him, nor was the plaintiff's alleged assignor or the firm with which he was connected associated with defendants or either of them in the rendition of services to the trustees, nor was there any agreement or understanding, express or implied, between the plaintiff's alleged assignor and the defendants or either of them regarding any allowances or fees to be received by the defendants as a partnership or by defendant A. Leo Weil as general counsel to the trustees, saving and excepting as hereinbefore alleged with regard to the fees paid out of the proceeds of the Frick sale for the services rendered in connection with the said sale.

18. And the defendant further avers that the alleged agreement set forth in the amended complaint herein where- [fol. 53] by the defendants are purported to have agreed that, while holding the office of general counsel to the trustees, they would collaborate with and act under the direction of the plaintiff's alleged assignor in the performance of services as general counsel to the trustees, and would act for the plaintiff's alleged assignor and the interests represented by him, and would receive out of the allowances to be made to them as general counsel to the trustees, such sum as plaintiff's alleged assignor considered just and equitable, the remainder of the amount of such allowances to be payable to plaintiff's alleged assignor, would have been, if any such agreement had been made, unprofessional, against public policy, a fraud upon the trustees and the Court designating and confirming the defendants as general counsel, and illegal, null and void.

And the defendant further alleges in this connection that in the course of the administration of the bankruptcy estate of the said Thompson, the interest of the said Creditors' Committee represented by the plaintiff's alleged assignor as its counsel were at times inconsistent with and opposed to the interests of the bankrupt estate represented by the trustees and by the defendants as their counsel, and that the allowances awarded and paid to the defendants, of which the plaintiff now seeks to recover a part, were so awarded

and paid for services rendered by the defendants to the trustees partly in connection with matters where the interests of the said Creditors' Committee represented by the plaintiff's alleged assignor as its counsel were, as aforesaid, inconsistent with and opposed to the interests of the bankrupt estate represented by the trustees and their counsel.

[fols. 54 & 55] Wherefore this defendant demands judgment dismissing the amended complaint herein, with costs.

Stein & Salant, Attorneys for Defendant A. Leo Weil. Office & P. O. address: 1328 Broadway, Borough of Manhattan, New York City. Carter, Ledyard & Milburn, of Counsel. Office & P. O. address: 54 Wall Street, Borough of Manhattan, New York City.

Duly sworn to by A. Leo Weil. Jurat omitted in printing.

[fol. 56] In United States District Court

[Title omitted]

Answer of Charles M. Thorp to Amended Complaint

The defendant Charles M. Thorp, by Stein & Salant, his attorneys, answers the amended complaint herein as follows:

1. He denies the allegation contained in the subdivision of the said amended complaint marked "First," that at all the times therein mentioned the defendants were copartners engaged in the practice of law in the City of Pittsburgh, Pennsylvania, under the firm name and style of Weil & Thorp; and he alleges in connection therewith that the defendants were such copartners until on or about the 1st day of December, 1920, but not thereafter.

2. He admits, upon information and belief, each and every of the allegations contained in the subdivision of the said amended complaint marked "Second."

[fol. 57] 3. He admits, upon information and belief, the allegation contained in the subdivision of the said amended complaint marked "Third," that the plaintiff's alleged as-

signor, acting under instructions of the creditors by whom he had been retained, and believing that it would be necessary for the protection of all of the general creditors of the said Thompson that bankruptcy proceedings should be instituted against him in order to prevent the disruption and sacrifice of his estate, determined to institute such bankruptcy proceedings. He admits the further allegation in said subdivision contained that to that end the plaintiff's alleged assignor informed the defendants of his plans in that regard and retained the defendants. He denies each and every other allegation in said subdivision contained, and he alleges in connection therewith, that plaintiff's alleged assignor retained the defendants under the following circumstances and solely for the following limited and specific purposes and no others, to wit:—Plaintiff's alleged assignor was at that time negotiating a sale of said Thompson's entire property or the greater bulk thereof, and plaintiff's alleged assignor was of the opinion and so stated to defendants, that the said sale would shortly be consummated and would meet with the approval of all the creditors of the said Thompson and that the bankruptcy proceedings would therefore be of short duration and would not go beyond an adjudication in bankruptcy or a composition in bankruptcy. Plaintiff's alleged assignor accordingly retained defendants to present and file an involuntary petition in bankruptcy against the said Thompson, to procure an adjudication that the said Thompson was a bankrupt, and to conduct the said bankruptcy proceedings and all proceedings that might be necessary and advisable in connec- [fol. 58] tion therewith for the purpose of preventing the disintegration of the said Thompson's estate until such adjudication or until the contemplated composition was effected, all of which was to be conducted under the supervision of the plaintiff's alleged assignor. He further alleges in connection therewith that plaintiff's alleged assignor so retained the defendants under an understanding and agreement whereby the defendants were to be paid and were to receive from the plaintiff's assignor in compensation for the services so to be rendered by them the sum of Five thousand ($5,000) Dollars or such other sum as plaintiff's alleged assignor might fix in the event that the services so rendered should be more extensive than were then contemplated.

4. He admits the allegation contained in the subdivision of the said amended complaint marked "Fourth," that bankruptcy proceedings were duly instituted on the petition of three of the creditors of said Thompson in the District Court of the United States for the Western District of Pennsylvania, for his adjudication as a bankrupt, and he admits the further allegation in said subdivision contained that thereupon such proceedings were had that on or about September 10, 1917, the said Thompson was duly adjudicated a bankrupt. He alleges in connection therewith that the said negotiations of plaintiff's alleged assignor for the sale of the said Thompson's entire property or the greater bulk thereof were not consummated either then or at any other time, that the contemplated composition was not effected, that it therefore became necessary to elect and appoint a trustee or trustees in bankruptcy in regular course, and that thereupon and at the request of plaintiff's [fol. 59] alleged assignor the defendants attempted in conjunction with the plaintiff's alleged assignor to secure the election and appointment of one George R. Scrugham as sole trustee; thereupon and at a meeting of creditors duly held three trustees were elected and appointed of the said Thompson's estate in bankruptcy, the said trustees duly designated the defendants as their general counsel, and Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr. Waitman H. Conaway, of Fairmont, West Virginia, as associate counsel, and the said designations were duly ratified and confirmed by the District Court of the United States for the Western District of Pennsylvania. He admits that up to the time of the election and appointment of the said three trustees as aforesaid the defendants acted for the plaintiff's alleged assignor and for the interests represented by him, to wit, a certain committee of the creditors of the said Thompson known as the Creditors' Committee, both in presenting and filing the petition in bankruptcy and in securing the adjudication in bankruptcy and in endeavoring to secure the election and appointment of the said sole trustee, and he further admits that in rendering the said services the defendants acted under the supervision and direction of the plaintiff's alleged assignor; but he emphatically denies that from and after the election and appointment as aforesaid of the said three trustees the defendants at any time acted for the

plaintiff's alleged assignor or for the interests represented by him or under the direction or supervision of the plaintiff's alleged assignor, or under or pursuant to any agreement or understanding, express or implied, with the plain-
[fol. 60] tiff's alleged assignor; and he alleges, on the contrary, that upon the election and appointment of the said three trustees as aforesaid and the designation and confirmation of the defendants as general counsel to the trustees as aforesaid, the retainer and employment of the defendants by the plaintiff's alleged assignor and the interests represented by him was fulfilled and terminated and came to an end, and that from that time forth the defendants acted in all matters connected with the said bankruptcy estate solely by virtue of and under and pursuant to their said designation and confirmation as general counsel to the trustees and as officers duly appointed of the Court, and not otherwise.

He denies each and every allegation in said subdivision contained not hereinbefore expressly admitted or denied.

5. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked "Fifth," except that he admits that between the presentment and filing of the petition in bankruptcy by the defendants and the appointment of the trustees, various complications arose which rendered it necessary for the defendants to perform during the said period more extensive and laborious services under the supervision of the plaintiff's alleged assignor than it was originally believed would be necessary for the defendants to perform during the said period, and except that he further admits that, recognizing that fact, plaintiff's alleged assignor and the defendants thereupon agreed that the compensation of the defendants for services in said bankruptcy proceedings up to the time of the appointment of the trustees was not to be limited to
[fol. 61] the sum of Five thousand ($5,000) Dollars. And he specifically denies that there was any agreement, express or implied, between the plaintiff's alleged assignor and the defendants regarding the performance of services by the defendants after the appointment of the trustees in bankruptcy, or regarding the compensation of the defendants for services performed by them after the appointment of the trustees in bankruptcy or regarding any collabora-

tion of the defendants with the plaintiff's alleged assignor and the firm of lawyers with which he was associated in the performance of services after the appointment of the said trustees, and he further specifically denies that there was any agreement, express or implied, between the plaintiff's alleged assignor and the defendants whereby the defendants were to receive for the services rendered by them after the appointment of the trustees such sum as plaintiff's alleged assignor might consider just and equitable, the remainder of any amount allowed to them to be payable to plaintiff's alleged assignor. And he further alleges that the services rendered by the defendants after their designation and confirmation as general counsel to the trustees were rendered in collaboration with the associate counsel to the said trustees duly designated and confirmed, to wit, Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr. Waitman H. Conaway of Fairmont, West Virginia, and not in collaboration with or under the direction of plaintiff's alleged assignor or the firm with which he was connected, and that any and all services rendered by plaintiff's alleged assignor and his said firm were rendered as counsel to the Creditors' Committee aforesaid and not otherwise. And he not only denies [fol. 62] that there was ever any such agreement or understanding contemplated, or made, or even suggested, as that claimed by plaintiff, but he alleges that any such agreement or understanding would have been unprofessional, contrary to public policy, a fraud upon the trustees and the Court appointing and confirming the defendants as general counsel to the trustees, and illegal, null and void.

6. He admits the allegation contained in the subdivision of the said amended complaint marked "Sixth," that the defendants continued to render services in the said bankruptcy proceedings, for which allowances were made to the defendants from time to time in said proceedings by the District Court of the United States for the Western District of Pennsylvania on or about September 3, 1918, July 2, 1919 and July 18, 1919, in the total sum of $30,500.00, on or about June 1, 1920, in the sum of $45,366.66, and on or about October 27, 1920 in the sum of $68,093.32, to be paid out of the estate of the bankrupt in payment for the services rendered by the defendants in said proceedings, and

on or about the said dates payments were received by the defendants in the amounts above set forth, but he denies each and every other allegation in said subdivision contained, and alleges in connection therewith that the defendants rendered no services in said proceedings after December 1, 1920, and received no payments for services in said proceedings after October, 1920.

7. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked "Seventh."

[fol. 63] 8. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked "Eighth," and he alleges, in connection therewith, that the plaintiff's alleged assignor in or about the year 1920 made a demand wholly without right, basis or justification, that the defendants pay to him forty (40%) per cent of all sums theretofore allowed to and received by them from the said bankruptcy estate.

9. He admits the allegation contained in the subdivision of the said amended complaint marked "Ninth," that the defendants refused to comply with the demands of plaintiff's assignor that they pay over to him forty (40%) per cent of the sums received by them, and he admits the further allegation in said subdivision contained that the defendants refused, after request, to pay the same, but he denies each and every other allegation in said subdivision contained.

10. He denies that he has any knowledge or information thereof sufficient to form a belief as to each and every of the allegations contained in the subdivision of the said amended complaint marked "Tenth."

Further answering the said amended complaint, and for a separate and distinct defense thereto, the defendant Charles M. Thorp alleges as follows:

11. In or about the month of August, 1917, plaintiff's alleged assignor retained and employed defendants to present and file an involuntary petition in bankruptcy against Josiah V. Thompson, to procure an adjudication that the [fol. 64] said Thompson was a bankrupt, and to conduct the said bankruptcy proceedings and all proceedings that might be necessary and advisable in connection therewith

for the purpose of preventing the disintegration of the estate of the said Thompson until such adjudication or until a contemplated composition was effected, plaintiff's alleged assignor was at said time negotiating a sale of said Thompson's entire property or the greater bulk thereof, and plaintiff's alleged assignor was of the opinion and so stated to defendants that the said sale would shortly be consummated and would meet with the approval of all creditors of the said Thompson and that the bankruptcy proceedings would therefore be of short duration and would not go beyond an adjudication in bankruptcy or a composition in bankruptcy. Defendants accepted the said retainer and employment for the limited and specific purposes above stated under and pursuant to an agreement between plaintiff's alleged assignor and defendants, whereby defendants were to perform the said services under the supervision and direction of plaintiff's alleged assignor, and were to be paid in compensation therefor by plaintiff's alleged assignor, the sum of Five thousand ($5,000) Dollars, or such other sum as plaintiff's alleged assignor might fix in the event that the services rendered should be more extensive than were then contemplated.

12. Thereupon and pursuant to the said retainer and employment defendants, acting under the supervision and direction of plaintiff's alleged assignor, did duly present and file an involuntary petition in bankruptcy against the said Thompson in the District Court of the United States for [fol. 65] the Western District of Pennsylvania, did duly procure on or about the 10th day of September, 1917, an adjudication that the said Thompson was a bankrupt, and did duly perform extensive and laborious services in various proceedings to prevent the disintegration of the estate of the said Thompson. The said sale of the entire property or the greater bulk thereof of the said Thompson failed of consummation and it became necessary to elect and appoint a trustee or trustees of the said Thompson's estate in bankruptcy in regular course. Thereupon and at the request of plaintiff's alleged assignor defendants performed further services for plaintiff's alleged assignor in endeavoring to procure the election and appointment of one George R. Scrugham as sole trustee. At a meeting duly held of the creditors of the said Thompson three trustees were duly elected and appointed on or about the 17th day of October,

1917. Thereupon and pursuant to the retainer and employment aforesaid, the said retainer and employment was fulfilled and the same terminated and came to an end.

The services so rendered as aforesaid by defendants under the said retainer and employment and at the request of plaintiff's alleged assignor were more extensive and laborious than had been contemplated by plaintiff's alleged assignor and defendants at the time of the said retainer and employment, and it was thereupon agreed that defendants should not be limited in their compensation for the said services to the sum of Five thousand ($5,000) Dollars.

13. Upon the election and appointment of the trustees in bankruptcy as aforesaid, the said trustees in bankruptcy duly designated, and the said District Court duly ratified [fol. 66] and confirmed the designation of, the defendants as general counsel for the said trustees in bankruptcy, and Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr. Waitman H. Conaway of Fairmont, West Virginia, as associate counsel for the said trustees. Thereupon and pursuant to their said designation as general counsel to the trustees, the defendants proceeded to render and did continue to render services as such general counsel to the trustees in connection with the said bankruptcy estate until on or about the 1st day of December, 1920, when the copartnership of the defendants was terminated. Upon information and belief, from and after said latter date the defendant A. Leo Weil has continued to render and is now rendering services as general counsel to the said trustee in connection with the said estate.

From and after the designation as aforesaid of the defendants as general counsel for the said trustees, all of the service rendered by the defendants up to on or about the 1st day of December, 1920, in connection with the said estate, have been rendered pursuant to the said designation and as officers of the Court, and the same have not been rendered under or pursuant to any agreement or understanding of any kind or nature whatsoever, express or implied, with the plaintiff's alleged assignor, or with any other person or persons whatsoever.

14. Immediately after the election and appointment of the said trustees in bankruptcy and the designation by them and the approval by the said District Court of their said counsel, the said trustees and their said counsel proceeded

[fol. 67] to conclude the sale of that portion of the bankrupt's estate involved in what is known as the Frick sale. Most of the substantial terms of the said Frick sale had, however, been negotiated prior to the appointment of the said trustees by the said Creditors' Committee and by plaintiff's alleged assignor as its counsel.

Upon the consummation of the said Frick sale it was determined to make an application for counsel fees out of the proceeds of the said sale for services rendered in connection therewith. Thereupon, and having in mind that most of the substantial terms of the said sale had been actually negotiated as aforesaid by the said Creditors' Committee and the plaintiff's alleged assignor as its counsel, and having further in mind that the plaintiff's alleged assignor had as yet received no compensation for the services rendered by him in connection with the estate of the said Thompson, the said general and associate counsel to the trustees and the firm with which plaintiff's alleged assignor was associated, pursuant to agreement among all of them, presented a joint petition and application for counsel fees to be paid to them jointly out of the proceeds of the said Frick sale for services rendered in connection therewith. The said petition and application was duly granted and an allowance was duly made out of the proceeds of the said Frick sale for counsel fees to the said petitioners and applicants jointly for services rendered in connection with the said sale. After a division of the counsel fees so allotted between defendants, on the one hand, and the associate counsel to the trustees, on the other hand, the defendants offered to plaintiff's alleged assignor to pay to him for the firm with which he was associated, to wit, Guggenheimer, Untermyer & Marshall, whatever proportion he desired out of the [fol. 68] balance left to be divided between the defendants and the said firm, and the defendants repeatedly requested plaintiff's alleged assignor to fix and name the proportion that he desired, but the plaintiff's alleged assignor did not do so at any time prior to the commencement of this action and has not done so even up to the present time.

15. At or about the time of the petition and application for the said fees from the said Frick sale, and in or about the month of May, 1918, a serious and personal disagreement, arising out of a matter not connected with the Thompson estate, occurred between the plaintiff's alleged assignor

and the defendant A. Leo Weil, of such a nature as to make further personal relations between them impossible, and it was thereupon agreed between the plaintiff's alleged assignor and the defendant A. Leo Weil that they and their respective firms should have no further professional relationship of any kind with each other.

16. The administration in bankruptcy of the said Thompson estate by the trustees and by their counsel continued, further sales of small portions of the estate were negotiated and made by the trustees and their said counsel, and in or about the month of June, 1919, the sale of the entire remainder of the said estate, constituting the bulk thereof, was negotiated and made by the trustees and their counsel to the Piedmont Coal Company under a contract approved, among others, by the said Creditors' Committee and by the plaintiff's alleged assignor as its counsel, wherein and whereby it was provided that the purchaser, in addition to [fol. 69] paying to the trustees in bankruptcy the purchase price therein named, would also pay to the said Creditors' Committee in full for the services of the said Creditors' Committee and its counsel, i. e., plaintiff's alleged assignor, prior to the bankruptcy and for such assistance as the said Creditors' Committee and its said counsel may have rendered to the trustees since the adjudication in bankruptcy, an amount not exceeding the sum of $360,000.00. The said contract of purchase and sale was duly ratified and approved by the said District Court, and the purchaser did thereupon pay to the said Creditors' Committee, pursuant thereto, the sum of $360,000.00 or the greater part of the said sum, and the plaintiff's assignor has received and will receive from the said sum a large amount of money in full for any and all services rendered by plaintiff's alleged assignor in connection with the estate of the said Thompson, both before the adjudication in bankruptcy and subsequent thereto.

Plaintiff's alleged assignor and the firm with which he was connected did not then or thereafter prior to the commencement of this action make any claim, nor has plaintiff in this action made any claim, upon defendants for any part of the fees received as aforesaid by defendants in connection with and out of the Frick sale, and defendants did not therefore demand from plaintiff's alleged assignor prior to the commencement of this action, and have not demanded

in this action, compensation for the services rendered by them as aforesaid prior to the election and appointment of the trustees in bankruptcy.

17 Any and all services rendered by plaintiff's alleged assignor in connection with the estate of the said Thomp- [fol. 70] son were so rendered, both before the adjudication in bankruptcy and after the said adjudication, as counsel to the said Creditors' Committee and not otherwise.

On the other hand, from and after the designation of the defendants as general counsel to the said trustees, any and all services rendered by the defendants in connection with the estate of the said Thompson were so rendered as such general counsel to the trustees and not otherwise, and any and all fees and allowances paid out of the bankrupt estate to the defendants and to Messrs. Umbel, Robinson, McKean & Williams and to Mr. Waitman H. Conaway, were, except as to the said Frick fees, allowed and paid for services rendered by them solely as general and associate counsel to the trustees, and were not allowed or paid for any services rendered in whole or in part by plaintiff's alleged assignor or by the firm with which he was connected, and the said fees were allowed and paid, as plaintiff's assignor and his representatives should have known and did well know, only after sworn proof had been submitted to the Court that the services for which the same were allowed and paid had been rendered by the said general and associate counsel to the trustees and not by any other person or persons whatsoever.

In performing the said services, the defendants acted solely for the said trustees, and did not act for the plaintiff's alleged assignor, nor was there any agreement or understanding, express or implied, that defendants as gen- [fol. 71] eral counsel to the trustees would act for plaintiff's alleged assignor or for the interests represented by him, nor was the plaintiff's alleged assignor or the firm with which he was connected associated with defendants in the rendition of services to the trustees, nor was there any agreement or understanding, express or implied, between the plaintiff's alleged assignor and the defendants regarding any allowances or fees to be received by the defendants as general counsel to the trustees, saying and excepting as hereinbefore alleged with regard to the fees paid out of the

proceeds of the Frick sale for the services rendered in connection with the said sale.

18. And the defendant further avers that the alleged agreement set forth in the amended complaint herein whereby the defendants are purported to have agreed that, while holding the office of general counsel to the trustees, they would collaborate with and act under the direction of the plaintiff's alleged assignor in the performance of services as general counsel to the trustee, and would act for the plaintiff's alleged assignor and the interests represented by him, and would receive out of the allowances to be made to them as general counsel to the trustees, such sum as plaintiff's alleged assignor considered just and equitable, the remainder of the amount of such allowances to be payable to plaintiff's alleged assignor, would have been, if any such agreement had been made, unprofessional, against public policy, a fraud upon the trustees and the Court designating and confirming the defendants as general counsel, and illegal, null and void.

And the defendant further alleges in this connection that in the course of the administration of the bankruptcy estate [fol. 72] of the said Thompson, the interests of the said Creditors' Committee represented by the plaintiff's alleged assignor as its counsel were at times inconsistent with and opposed to the interests of the bankrupt estate represented by the trustees and by the defendants as their counsel, and that the allowances awarded and paid to the defendants, of which the plaintiff now seeks to recover a part, were so awarded and paid for services rendered by the defendants to the trustees partly in connection with matters where the interests of said Creditors' Committee represented by the plaintiff's alleged assignor as its counsel were, as aforesaid, inconsistent with and opposed to the interests of the bankrupt estate represented by the trustees and their counsel.

Wherefore this defendant demands judgment dismissing the amended complaint herein, with costs.

Stein & Salant, Attorneys for Defendant Charles M. Thorp. Office & P. O. address: 1328 Broadway, Borough of Manhattan, New York City. Carter, Ledyard & Milburn, of Counsel. Office & P. O. address: 54 Wall Street, Borough of Manhattan, New York City.

[fols. 73 & 74] *Duly sworn to by Charles M. Thorp. Jurat omitted in printing.*

[fol. 75] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUBSTITUTING ATTORNEYS FOR DEFENDANTS—Jan. 5, 1922

Upon the annexed consent, it is hereby

Ordered, that Messrs. Stein & Salant be, and they hereby are substituted as attorneys for the defendants in the above entitled action in place and stead of Messrs. Crim & Wemple.

Alex Gilchrist, Jr., Clerk.

[fol. 76] IN UNITED STATES DISTRICT COURT

[Title omitted]

CONSENT TO SUBSTITUTION

We hereby consent that Stein & Salant, Esqs. be substituted as attorneys for the defendants, A. Leo Weil and Charles M. Thorp, in the above entitled suit in place of Crim & Wemple, and that an order to this effect may be entered without notice.

Dated December —, 1921.

Crim & Wemple, Attorneys for Defendants A. Leo Weil, Charles M. Thorp.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

On this 24th day of December, 1921, before me personally came A. Leo Weil to me known and known to me to be the person who executed the foregoing instrument, and he acknowledged to me that he executed the same for the uses and purposes therein set forth.

L. A. Wirth, Notary Public. My commission expires January 4th, 1925.

[fol. 77] In United States District Court

[Title omitted]

Order of Reference—Dec. 10, 1923

Upon reading and filing the annexed stipulation and on motion of Guggenheimer, Untermeyer & Marshall, attorneys for the plaintiff, it is ordered that the trial of the above entitled action be and the same hereby is referred to Allan Wardwell, Esq., as Referee, to hear, try and determine the same, with all the powers to act and rule upon the said trial possessed by the Court, and it is

Further ordered, that the fees of the said Referee and of the stenographer herein, shall be included and taxed in the said action.

John C. Knox, J. D. C.

[fol. 78] In United States District Court

[Title omitted]

Stipulation That Cause be Tried Before Referee

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the trial of this case be and the same hereby is referred to Allen Wardwell, Esq., as Referee, to hear, try and determine the same, with all the powers to act and rule upon said trial possessed by the Court, and it is

Further stipulated and agreed that the fees of the said Referee and of the stenographer herein, shall be included and taxed in the said action, and it is

Further stipulated and agreed that an order may be entered herein by either party without further notice.

Dated New York, December 4th, 1923.

Guggenheimer, Untermyer & Marshall, Attorney- for Plaintiff. Stein & Salant, Attorneys for Defendants.

[fol. 79] IN UNITED STATES DISTRICT COURT

[Title omitted]

Hearing Before Allen Wardwell, Referee

OPINION OF REFEREE

This action is brought by the plaintiff, as assignee of Samuel Untermyer, a lawyer practising in the City of New York, against the defendants, who until December 1, 1920 were a law partnership practising in Pittsburgh, Pa. On December 1, 1920, the defendant Thorp severed his connection with the defendant Weil. For the sake of brevity, unless otherwise specified, the word "plaintiff" will be used to designate Mr. Untermyer. At the close of the case, the plaintiff moved to amend the pleadings to conform to the proof. This motion was granted and an amended complaint was served. The amended complaint set up that, prior to August, 1917, plaintiff's assignor had been retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pennsylvania, where he had been engaged in the business of banker and in the operation of coal mines. That Thomp-
[fol. 80] son's affairs were greatly involved and it was agreed that the extensive properties of Thompson should be conserved so that they might be applied equitably to the payment of creditors claims; the plaintiff determined, in order to protect the estate, it was necessary to institute bankruptcy proceedings. He informed defendants of his plans and retained them under his supervision to conduct such bankruptcy proceedings and to accept in full payment the sum of $5,000. Bankruptcy proceedings were begun, and on September 10, 1917 Thompson was adjudicated a bankrupt and trustees were appointed. That the administration of the estate proceeded, the defendants acting for the plaintiff's assignor and the interests represented by him. The administration of the estate became very complicated, "which rendered it necessary for the defendants and the plaintiff's assignor and the firm of lawyers with which he was and is associated together to perform more extensive and laborious services than it was originally believed to be necessary for the defendants to perform in the adminis-

tration of the said estate in bankruptcy. Recognizing that fact plaintiff's assignor and the defendants thereupon agreed that the plaintiffs' assignor and the firm with which he was associated should together perform such services and that the compensation of the defendants for services in said bankruptcy proceedings was not to be limited to the sum of Five thousand Dollars ($5,000.00) as theretofore stipulated, and in lieu of the compensation originally stipulated it was agreed that the plaintiff's assignor and the firm of lawyers with which he was associated should collaborate with the defendants under the direction of the former in the performance of such services and that the defendants [fol. 81] were to receive for the services rendered by them out of such allowance as should eventually be made by the Court in payment of such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him." The plaintiff then sets up that, pursuant to said arrangement, the defendants continued to render services in the bankruptcy proceedings under the general supervision of plaintiff's assignor and "with the active aid of the latter and of the firm with which he was associated", for which services allowances aggregating $188,293.29 were paid to the defendants by the Trustees in bankruptcy. That "a substantial part of the services for which said allowances were made was performed by the plaintiff's assignor and by the said firm with which he was and is associated". That the plaintiff's assignor determined that a fair division of the said allowances was 60% to the defendants and 40% to the plaintiff, and informed the defendants of his determination in this regard. Plaintiff thereupon demands judgment for $75,317.31, with interest from various dates.

The defendants' answers to this amended complaint admit that they were retained to institute the bankruptcy proceeding and allege that the defendants were retained to procure an adjudication for Thompson as bankrupt, to conduct the bankruptcy proceedings and all proceedings that might be necessary or advisable for the purpose of preventing the disintegration of the Thompson estate until the adjudication or until a contemplated composition of

creditors was effected, all of which were to be conducted under the supervision of the plaintiff's assignor. The understanding and agreement as to payment was that de- [fol. 82] fendants were to receive $5,000, or such other sum as the plaintiff's assignor might fix in the event the services so rendered should be more extensve than it was contemplated. They allege that the negotiations for the sale of Thompson's property were not consummated and the contemplated composition was not effected. It therefore became necessary to elect Trustees in Bankruptcy. Such Trustees were elected and designated defendants their general counsel with others as associates. They admit that up to the time of the election and appointment of the three Trustees defendants acted for the plaintiff's assignor and the interests represented by him, that is, a certain committee of the creditors of Thompson known as the Creditors Committee, in securing the adjudication in bankruptcy and up to the time of the appointment of the said Trustees. They deny that after the appointment of the said three Trustees they acted at any time for the plaintiff's assignor under any agreement, express or implied, and allege that their retainer and employment by the plaintiff's assignor terminated upon the appointment of the three Trustees, and generally deny that after the appointment of the said Trustees the defendants in any way acted as counsel for the plaintiff or the interests which he represented, or rendered any services in collaboration with them, and that all services rendered since that date were rendered for the Trustees and as general counsel for them. The defendant Weil admits the amount of the allowances paid, except that he states that certain allowances were made and paid after the dissolution of his firm and were allowed solely for the services of the defendant Weil.

[fol. 83] The defendants set up by way of separate defense the allegations contained in their denials and certain other matters which will be dealt with more in detail in the discussion of the testimony. The substance of defendants' position appears to be:

1. That they were retained by the Creditors Committee, which was represented by Mr. Untermyer, to obtain an adjudication in bankruptcy and to endeavor to keep the estate intact until a composition could be arrived at, in view of a

certain proposed sale of all of the property which had been under negotiation prior to the commencement of the bankruptcy proceeding; that this sale having failed, Trustees of the estate were appointed and that the defendants were appointed counsel to the Trustees and from that moment their relation with the plaintiff ceased.

2. That after the month of May 1918 a serious personal disagreement, arising out of matters not connected with the Thompson estate, occurred between the defendant Weil and the plaintiff, and it was then agreed that there should be no further professional relations between the plaintiff and the defendants and the firms with which they were connected.

3. That in June 1919 the entire remainder of the bankrupt's estate was sold to the Piedmont Coal Company, and that as part of the said sale the purchasers agreed to pay to the Creditors' Committee in full for the services of the Creditors Committee and counsel, a sum not to exceed $360,00, and that from said sum the plaintiff has received and will receive a large amount of money in full [fol. 84] for any and all services rendered by him in connection with the Thompson estate, both before the adjudication in bankruptcy and subsequent thereto.

4. That the agreement set forth in the amended complaint that the defendants would collaborate with and act under the direction of the plaintiff's alleged assignor and would act for the plaintiff's alleged assignor and the interests represented by him and would receive out of the allowance to be made to them as general counsel for the Trustees such allowance as plaintiff's assignor should determine would have been, if any such agreement had been made, against public policy, a fraud upon the Trustees and illegal, null and void.

5. Defendants further contended in their briefs and upon the argument that the contract relied upon was vague and indefinite and therefore unenforcible.

A great mass of testimony, both oral and documentary, was presented to the Referee, much of which seems to be irrelevant or only dimly connected with the main issues involved. That there was some arrangement between the

plaintiff and the defendants with regard to compensation in connection with the Thompson estate is admitted. That some arrangement or agreement existed with respect to the division of the fees paid by the Trustees to their counsel in connection with the Frick sale, in which plaintiff's assignor was to share, also is not denied.

The sole issue of fact seems to be:

What was the nature of the arrangement or agreement between the parties? Did it conform to the agreement as [fol. 85] alleged by the plaintiff? Or did it any way fall short of this?

If the Referee should find that an agreement existed conforming to the allegations of the complaint, then the questions of law arise:

a. Is such agreement valid and enforcible, or must it be held to be contrary to public policy and therefore void; or

b. Is it so vague and uncertain as to be incapable of enforcement?

Should these questions be determined favorably to plaintiff, then only will arise the question of the amount involved.

The evidence of the agreement submitted by the plaintiff consists of conversations between him and the defendant Weil and of correspondence between the plaintiff or those associated with him and the defendant Weil and others in his office. Most of this correspondence deals with matters in connection with the affairs of the estate and may be disregarded except as it shows the close association between the plaintiff and the defendants in matters concerned with this estate, particularly in regard to the sales of the bankrupt's property. There is also certain correspondence between the defendant and Mr. Louis Marshall, who was and still is associated with the plaintiff, which took place subsequent to the time when this controversy first arose. This correspondence was introduced upon the theory that it contained admissions upon the part of the defendant of the existence of the contract. An examination of it, however, leads the Referee to the conclusion that in it the defendant for the most part denies the making of the contract, and that therefore this part of the correspondence is [fol. 86] irrelevant and should have been excluded, except

as to a few statements in certain letters which will hereafter be specifically referred to.

The Referee has come to the conclusion that a contract substantially as alleged by the plaintiff did exist. The pertinent evidence leading to this conclusion is as follows:

The first interview between Mr. Weil and Mr. Untermyer took place in the latter part of August, 1917. At this interview Mr. Untermyer testified that he stated to Mr. Weil what he had previously stated on the record with regard to the affairs of the Josiah V. Thompson estate. This in substance was that in the Autumn of 1915 Mr. Untermyer was approached by Mr. Scrugham, who subsequently became one of the Trustees in Bankruptcy of Josiah V. Thompson, to interest himself in the affairs of Mr. Thompson. It appeared that Mr. Thompson owned a great amount of coal properties in Pennsylvania and West Virginia and was President and practically the only owner of the leading bank at Uniontown, Pa. He had interests in about 275,000 acres of coal land, partly developed and partly undeveloped. About 30,000 acres of this he owned alone, and in the balance he had various fractional interests, there being about seven hundred associates in the ownership of the property. His affairs had become much involved and Receivers had been appointed of his property in the Court of Common Pleas in Fayette, Pennsylvania in January, 1915. There were mortgages on the property aggregating some $19,000,000. Most of these mortgages were past due and the unsecured creditors were threatening suit. The estate was in great danger of disintegration. The un- [fol. 87] secured creditors were about fifteen hundred in number, with claims aggregating over $15,000,000. At Scrugham's request, Mr. Untermyer went to Uniontown and held a large meeting of creditors. He suggested the formation of a committee with drastic powers, with the object of seeing if foreclosures of mortgages and other liens could not be stayed and the property saved. Such committee was formed under a Creditors' Committee Agreement dated January 31, 1916. Mr. Untermyer alleges that 95% of the $15,000,000 unsecured claims were deposited under the agreement. The exact percentage of the claims is not admitted by the defendant, but it is conceded that a very large proportion of the claims, not less than 90%, were

deposited with the Committee. It was contemplated under this agreement that bankruptcy proceedings might be necessary. "During all this time" (that is, up to the interview with Mr. Weil) "we (referring to the Creditors Committee) were negotiating for the sale of these properties." A contract for the sale of all the properties had been negotiated with one Ralph Young, connected with the Louis Hill interests of Minneapolis, the negotiations going so far as the making of an agreement subject to certain further investigations. This agreement was dated June 2, 1917, and was still pending when the bankruptcy proceedings were begun. It included all of the properties except the bank building in Uniontown. It appears that the Supreme Court of Pennsylvania held the receivership proceedings in the State Court to be invalid and it was at this point that Mr. Untermyer called upon Mr. Weil for aid. As to this interview, which took place in New York on or about August 21, 1917, Mr. Untermyer states in part as follows:

[fol. 88] "I asked Mr. Weil whether he knew anything about the Thompson Estate, and he said he did not, he had had no connection with it in any direction. I explained to him all that we had done. My recollection is that at that time I showed him the Young Hill agreement, and either I or Mr. Wickwire" (an associate of Mr. Untermyer) "showed him such papers as we had; I am not sure whether we gave him any papers at that time or not. I told him that I had concluded that we would have to go into bankruptcy, that we represented practically all the unsecured creditors, and that I therefore anticipated no great difficulty in the bankruptcy proceeding or in the selection of a trustee. I told him we wanted Mr. Scrugham as trustee * * * that I did not expect the bankruptcy proceedings to be very protracted because I had great hopes of the Young agreement being carried out, and that if carried out it would assure a composition in bankruptcy, but that it might not be carried out, that we had had so many disappointments with respect to selling property of this estate that it might not be carried out. I told him I very strongly suspected that the Frick interests were behind the contract; * * * I said to Mr. Weil in substance that I wanted him to represent me and the interests I represented in that bankruptcy proceedings. * * * I told him of the

provision in the agreement for compensation to the creditors committee and its counsel, and asked him whether he would be willing to act. He said he would be glad to act. I said to him that as I contemplated that this deal might go through in composition I was willing that his compen- [fol. 89] sation should be fixed at $5,000 for his services in connection with the bankruptcy proceedings. He expressed himself as entirely satisfied with that arrangement or with any other arrangement that I might see fit to make. He was very nice about it and said he was entirely at our service, and that the question of compensation would rest entirely with me. * * * I asked him whether he thought $5,000 was fair, and he said he thought it would be fair for his services in connection with the bankruptcy proceedings."

There is no substantial difference between Mr. Untermyer and Mr. Weil in regard to this first interview. Mr. Weil says in regard to it:

"He stated to me at that interview * * * that he was the counsel for the creditors' committee; that the receivers had been appointed for the J. V. Thompson estate; that the Supreme Court of Pennsylvania had discharged the receivers and that in consequence there were foreclosures on mortgages being made, sales on execution under judgments and under attachments and other proceedings which tended to disintegrate and dispose of the estate in parcels. And he wanted to have an application in bankruptcy made to have Mr. Thompson adjudicated a bankrupt so as to preserve the estate from disintegration, and he wanted me to file this application on behalf of creditors. He stated at the same time that the creditors' committee had made a sale of the entire property to the Hill Syndicate, so called, parties from the West, and that in all probability we would not [fol. 90] have to even go to the length of an actual adjudication; that the sale was liable to be consummated almost any day, and they expected to consummate it very quickly; but that meanwhile he wanted applications made for injunctions and other proceedings taken to preserve the estate pending the consummation of the estate. He stated at the same time that he thought a payment of $5,000 for that service would be sufficient and asked me what I thought about it. I told him if that was all we had to do I was per-

fectly satisfied with that or any other amount that he might fix or think was proper."

The next interview on the subject of fees to which Mr. Untermyer testified was in New York, in September, 1917, after the 16th of that month. This was after the adjudication in bankruptcy, which occurred on the 10th day of September, 1917, but before the appointment of the Trustees and the selection of their counsel, which did not take place until October 18th of that year. Mr. Untermyer says of this interview that he wanted Mr. Weil to go on and do what he could to assist in the bankruptcy proceeding and reorganization and that if the composition did not go through and there was a general fight he did not expect the arrangement made as to the $5,000 compensation to be conclusive and that he, Weil, said if he went on he would leave it to Mr. Untermyer to say what he should get. "That he would act for me and was representing me, and that the whole subject would be left in my hands, and that he would be glad to leave it to me to say what he should receive."

Mr. Weil denies that this conversation or any part of it took place. Mr. Weil, however, in his letter to Mr. Marshall [fol. 91] of November 18, 1920 (Plaintiff's Exhibit 324) says:

"I do not know why he (referring to Mr. Untermyer) now refers to this $5,000, because he agreed with me that the changed conditions, of course, made that arrangement wholly inapplicable."

This sentence was called to his attention by his counsel and the question asked, "Did you have any talk with Mr. Wickwire about that?" Mr. Wickmire was Mr. Untermyer's assistant. His answer was "Yes", at his office in Pittsburgh some time prior to the appointment of their firm as general counsel to the Trustees. He says:

"I called his (Mr. Wickwire's) attention to the immense amount of work we were doing in connection with those injunction proceedings * * * and stated to him the agreement which had been made which has been testified to."

(Obviously referring to the first agreement made at the end of August, 1917, for the $5,000 compensation.) He further says:

"I asked Mr. Wickwire to report this conversation that I have referred to to Mr. Untermyer, and the next time he came to Pittsburgh he made the statement to me simply Mr. Untermyer agreed to that fully, that he understood the situation and was perfectly satisfied that the $5,000 amount was not sufficient to cover the services that we had rendered."

Whether, therefore, the conversation occurred between Mr. Untermyer or through Mr. Wickwire, as Mr. Weil testifies, [fol. 92] it is obvious that at this point and as subsequently interpreted by Mr. Weil, the compensation to Mr. Weil was not to be limited to $5,000.

The Referee's conclusion of the purpose of the retainer by Mr. Weil, as shown by the testimony at this point, is substantially as follows:

Mr. Untermyer's object was to keep the estate together until the property could be disposed of and until that could be accomplished to prevent the disintegration of the estate by the foreclosure of mortgages or judgment or other liens. At this time it was hoped and expected that the Young or Hill contract, which contemplated a sale of the entire property, would go through and that a composition of creditors would follow. Mr. Weil's retainer was obviously on behalf of the Creditors' Committee and his actions would be subject to Mr. Untermyer's direction and he was to receive as compensation such amount as Mr. Untermyer should see fit, which was understood to be in excess of $5,000. It seems clear that at this point there was no arrangement as to who was to be counsel for the Trustees and no provision as to who the Trustee or Trustees were to be, the only discussion on this point being Mr. Untermyer's instructions to Mr. Weil to use his efforts to have Mr. Scrugham appointed sole Trustee, to which there could be no objection in view of the fact that Mr. Untermyer was acting for those in control of a very large proportion of the creditors. If the agreement stood at this point alone, without any further evidence as to the application of the arrangement to allowances or payments made by the Trustees to their counsel, it would seem that it must have referred only to payments for compensation to be made by the Creditors' Committee. [fol. 93] It was not expected that the Trustees or their counsel would have much to do and that the sales of the

property could go through promptly. The real purpose of the arrangement, however, was based upon the bankruptcy proceedings being the means for holding the estate together until the sales could be consummated, and Mr. Weil was employed for the purpose of doing whatever might seem to be necessary in the bankruptcy proceedings to accomplish that end. While it is true that at this time the only fees that have been under consideration were such as might be paid by the Creditors' Committee, nevertheless, in view of the general purpose of the agreement, this arrangment could properly be applied to fees subsequently allowed to the Trustees if in dealing with such fees the parties subsequently understood and interpreted the agreement to apply to such fees.

Upon this point it becomes necessary to examine the correspondence which took place at or about the time that the first allowance to the Trustees was in contemplation and was made. On the 17th of October, 1918, three Trustees were appointed—Mr. Scrugman, Mr. Hite and Mr. Hertzog. They promptly selected as their counsel Weil & Thorp, Waitman H. Conaway and Umbel, Robinson, McKean & Williams. It further appears that no progress was made with the sale of the property as a whole under the so-called Young-Hill deal but that a portion of the property was sold by the Trustees under a contract known as the Frick contract. This contract had been carved out of the Hill sale and had been entered into by the Creditors' Committee prior to the appointment of the Trustees in Bankruptcy. [fol. 94] It was immediately adopted by the Trustees in Bankruptcy and was finally consummated. The correspondence on the subject of compensation at or about the time of the consummation of the Frick sale began with a letter from Mr. Weil to Mr. Wickwire, April 19, 1918 (Plaintiff's Exhibit 129) in which he says:

"I have suggested to Judge Umbel and to the Trustees that we get together early next week and determine the amount of the fees of counsel, and counsel will have to agree upon the distribution thereof * * * Of course these fees will be limited to the services in connection with the Frick sale. * * * In fixing these fees I ought to know whether or not you expect us to provide for a payment to

you out of these fees. In other words, how shall your firm and our firm participate in these fees. What are your ideas and those of Mr. Untermyer on the subject? They will have to be included, I apprehend, in allowances to us, and the settlement will be between yourselves and ourselves, as I do not see how your firm could be directly allowed compensation as attorneys for the Trustees."

Mr. Wickwire answers to this in part—Letter of April 22, 1918 (Plaintiff's Exhibit 130):

"The Frick sale has by consent been carved out of the Hill deal, and as the consideration is a substantial one, a part of our compensation should be received from this partial sale of the estate. As to how this should be worked out, I desire to refer the matter to Mr. Untermyer. Whether we should be directly recognized and compensated in the proceeding, or whether we should participate in an [fol. 95] allowance to be made to you as the chief counsel for the Trustees in Bankruptcy (pursuant to the understanding that you were to serve in this capacity for Mr. Untermyer's account), are questions that I think should be settled by you and Mr. Untermyer."

The words in parenthesis are important. There is no direct testimony so far in the evidence on this point other than the general fact that the first retainer was to do what might be necessary in connection with the bankruptcy proceedings to consummate the general plans of the Creditors' Committee. Mr. Weil's answer to Mr. Wickwire—April 23, 1918 (Plaintiff's Exhibit 131) contains the following:

"I have yours of the 22nd * * * I really cannot see how the compensation to you for the services you mention can be included in the allowance on this Frick sale. However, that may be worked out. Of course I mean an allowance to you directly. On the other hand, to include your allowance with the allowance to our firm as attorneys for the trustees—regardless of any question of division between ourselves—must not be in such a way as to place us in the impossible attitude of demanding too large a compensation, which would reflect upon and injure our firm. As to the division between ourselves, of course that is an entirely different matter without regard to the amount awarded."

Then comes the letter of April 26th from Mr. Wickwire to Mr. Weil (Plaintiff's Exhibit 133). This letter Mr. Weil denies receiving, but in his subsequent correspondence with [fol. 96] Mr. Marshall, Mr. Marshall quotes this letter practically entire, and in reply to Mr. Marshall's letter Mr. Weil twice states that he answers this correspondence with all of the previous correspondence before him. Although Mr. Weil also testifies that he did not read that portion of Mr. Marshall's letter which contained the extracts from the letter of April 26th, it seems apparent that his answer constitutes an admission of the receipt of the letter of April 26th. In this letter to Mr. Weil Mr. Wickwire writes in part as follows:

"It is my understanding that you originally made an arrangement with Mr. Untermyer to assist him in this business for a specified fee of $5,000.00. I assume from your letter that you entertain the view that on account of the amount of work which you have done you should not be limited to this figure, and I may say that I, personally, would entertain the same opinion."

(This statement would seem to indicate that the arrangement as to compensation in addition to the $5,000 was made with Mr. Untermyer and not with Mr. Wickwire.)

"In your letter, however, of the 19th inst., you refer to the counsel fees payable in respect to the Frick deal, and you say:

'In fixing these fees I should like to know whether or not you expect us to provide for a payment to you out of these fees? In other words, how shall your firm and our firm participate in these fees?' etc.

"It occurs to me that one not familiar with the situation might derive an erroneous impression from the language [fol. 97] which you have used and which I am sure does not reflect your actual intentions.

The business, of course, was Mr. Untermyer's and in asking you to represent him in it it was contemplated that the fees received would be for Mr. Untermyer's account and that, as you will remember, was the express understanding between us on the subject • • •

Any amount which would be formally allowed to you would naturally be received for Mr. Untermyer's account

and subject to an adjustment between you. The amount to which you would be entitled being $5,000 and such further sum as under the circumstances he would deem just and equitable."

Mr. Weil does not answer this letter directly, but in his letter of April 29th to Mr. Wickwire it appears that he expects to seem Mr. Untermyer in Philadelphia on Thursday morning, and says:

"I wish you would talk this matter (that is compensation) over with Mr. Untermyer and I will be glad to discuss it with him when I see him in Philadelphia."

Mr. Weil and Mr. Untermyer did meet in Philadelphia early in May 1918 at a hearing before the Circuit Court of Appeals connected with the Thompson estate. Mr. Untermyer and Mr. Weil differ radically as to the substance of their conversation at this time, but one fact stands out as admitted by both parties, which is that Mr. Untermyer expressed his dissatisfaction at Mr. Weil's attitude in regard to the fees of counsel to the Trustees. Upon his return to Pittsburgh and under date of May 7, 1918 (Plaintiff's Ex-
[fol. 98] hibit 144), Mr. Weil wrote to Mr. Untermyer as follows:

"I have just returned home this morning. I have not yet recovered from my amazement at your construction of my letter to Wickwire of the 19th, and of the 23rd in reply to his on the 22nd, in relation to fees. You have taken all of the heart out of me in relation to this case. If you think, as you implied in your statement to me, that I was trying to swindle you out of your fees, I would not want to longer continue in the case as associate counsel with one entertaining such an opinion of myself. I am perfectly willing to retire, waiving all claims of compensation for services previously rendered.

On April 19th I called Mr. Wickwire's attention to the amount of money available for distribution for fees and expenses of the Frick sale, and expressed the opinion that no fees could be allowed except for services in connection with the Frick sale. I called attention to the fact that your fees would have to be included, in my opinion, with ours, in these words:

'In fixing these fees, I ought to know whether or not you expect us to provide for a payment to you out of these fees. In other words, how shall your firm and our firm participate in these fees. What are your ideas and those of Mr. Untermyer on the subject? They will have to be included, I apprehend, in allowance to us, and the settlement will be between yourselves and ourselves, as I do not see how your firm could be directly compensated as attorney for the trustees.'

[fol. 99] I do not think that the language admits of any other construction than that intended. Your firm was entitled to compensation wholly separate and apart from ourselves, but I did not see how those services could be allowed for out of this sale.

As to the allowances to us as attorneys for the trustees, of course you were to participate, and the settlement, that is, the amount to be allowed to us, was to be arranged between yourselves and ourselves. The only question raised was as to how your firm could be directly compensated as attorneys for the trustees. There is nothing whatever in this letter that would justify any assumption on your part that we did not recognize your rights in connection with these allowances for fees to the attorneys for the trustees.''

He then quotes further from Mr. Wickwire's letter to him of the 22nd, and his reply of the 23rd as to how the application fo rallowance should be made, and says:

place us in the position of asking exorbitant fees • • •

plication for allowance should be made, and says:

''I then asked Mr. Wickwire to go over the matter with Mr. Untermyer and when he came here be prepared to act. Here again is brought out the thought of the first letter of an allowance to you directly, (in which I could have no possible interest,) for services rendered by you to this estate.

As to the allowance to us as attorneys for the trustees, we recognize, of course, as stated, that that was for our joint account, to be distributed in accordance with your wishes and with our agreement in the premises, the only qualification being that, as we recognized your rights to a [fol. 100] large compensation, I did not want this put under cover of payment to the attorneys for the trustees, and thus place us in the position of asking exorbitant fees • • •.

When we were appointed attorneys for the trustees, as Mr. Wickwire stated, I stated to him I understood, of course, that we were acting for you and were appointed practically as your representative"

Mr. Weil contends that this letter refers only to the Frick fees, but it cannot be limited to this narrow construction. The occasion it is true is the fixing of the allowances in connection with the Frick sale, but the language is far broader than that and refers to a general arrangement between the parties, but the particular application of this arrangement is to the Frick fees. No special arrangement had yet been made as to the fixing of the Frick fees; Weil so testified; in fact, that was the matter under discussion, so when Mr. Weil says:

"As to the allowance to us as attorneys for the trustees, we recognize, of course, as stated, that that was for our joint account, to be distributed in accordance with your wishes and with our agreement in the premises"

he must refer to some previous agreement, and this agreement could only be the one made prior to the appointment of the Trustees which Mr. Weil now interprets to refer to compensation allowed by the Trustees. Mr. Weil carefully distinguishes between any compensation which might be allowed directly to Mr. Untermyer or his firm "in which I could have no possible interest" and the allowance made to [fol. 101] counsel for the Trustees in which he and Mr. Untermyer were to share. His recognition of the distinction between the compensation allowed to Mr. Untermyer directly, in which he has no interest, and Mr. Untermyer's interest in the fees allowed to counsel to the Trustees would seem to dispose of the contention made by Mr. Weil in respect to the compensation to counsel of the Creditors' Committee allowed upon the consummation of the Peidmont sale which Mr. Weil contends would cover any interest which Mr. Untermyer might have in the fees allowed to counsel for the Trustees. This letter of May 7th set Mr. Untermyer's mind at rest, for he answers on May 9th (Plaintiff's Exhibit 145) in part as follows:

"I have reached the conclusion that you are right and I am wrong, and I hereby apologize. The facts out of which my misunderstanding of the situation arose are as follows:

As I was about leaving the office one afternoon Mr. Wickwire came to me and said that he had a letter from you in which you inquired whether our firm expected to be paid or provided for out of the fees that you were receiving in connection with the Frick matter. I told him I was astounded at such a suggestion; that I understood we were in charge of the business and that it was for Mr. Weil to inquire what part of the fees we thought he should receive rather than for him to ask whether we would be paid. I did not at that time see the letter, except that my attention was called to this paragraph in it:

[fol. 102] 'In fixing these fees I ought to know whether or not you expect us to provide for a payment to you out of these fees.'

Subsequently, Mr. Wickwire told me he sent me the letter but I had never read it until now. It is manifest from that letter that there is no difference between us and that in talking with you, I was under a grave misapprehension."

He then refers to another matter outstanding between them over which he states he is greatly incensed and which "has led me to the conclusion that the less our offices have to do with one another hereafter, the more comfortable it will be for both of us." This last statement Mr. Weil interprets as proof of his contention that whatever else may be said of the transaction up to this time, at least at this point the relations between the two firms were broken off. I cannot construe it as applying to the Thompson case, or if it did it was not carried into effect, because the correspondence between Mr. Weil and Mr. Untermyer's assistants in connection with the Thompson estate after this correspondence continued to be practically as active as before. Whatever may be said as to the exact terms of the agreement made prior to the appointment of the Trustees and its application to fees to be received by counsel for the Trustees not yet appointed as of the time it was made, it seems obvious that the parties by their correspondence just cited mutually agreed and understood that the original agreement was meant to and did apply to fees to be received by counsel for the Trustees and that it would not apply to fees to be received by Mr. Untermyer directly; with, how-

[fol. 103] ever, this further qualification, that the whole object sought to be accomplished by Mr. Untermyer and the Creditors' Committee was the preservation of the estate as against forced sales by mortgages, judgment creditors and other lienors and the sale of the properties by contract, and that when that object should be accomplished the arrangement would end.

The application to the court for allowance to counsel for the Trustees in connection with the Frick sale was asked for in the following way: Counsel for the Trustees asked for $75,000 for services in connection with the Frick sale to Messrs. Guggenheimer, Untermyer & Marshall, Weil & Thorp, Umbel, McKean & Robinson and Crago & Montgomery. The bill bore the annotation "Distribution of this amount among the respective counsel having been arranged between themselves by agreement." The bill is dated June 1, 1918. At the same time special application was made by Guggenheimer, Untermyer & Marshall, as attorneys for the Creditors' Committee, for $25,000. The separate bill of Guggenheimer, Untermyer & Marshall was disallowed by the Referee and the counsel for the Trustees was allowed $50,000. An appeal to the District Court for the Western District of Pennsylvania was taken. Judge Thompson affirmed the Referee, except that he reduced the fees of counsel for the Trustees from $50,000 to $40,000. The statement in the joint bill that the amount of compensation had been agreed upon by counsel does not seem to be quite accurate. It should have read "to be agreed upon by counsel," as there was considerable discussion afterwards by correspondence and otherwise of the distribution of the $40,000 finally allowed.

[fol. 104] It is the conclusion, therefore, of the Referee upon the question of fact that there was an agreement between the plaintiff and the defendant with respect to the distribution of the fees received by the defendants as counsel to the Trustees in the Thompson estate and that such agreement was that the amount of such fees when received should be divided in such manner as Mr. Untermyer should determine; this agreement covers the period from the beginning of the bankruptcy proceedings until the time when

the properties were sold, and applies to all fees received by the defendants from the Trustees during that period.

Defendants contend, however, that should the Referee find that any such agreement was made, the same is contrary to public policy, illegal and void and a fraud upon the Court and cite a number of cases dealing with contracts which have been held to be unenforcible on this ground. Obviously, it is the duty of the Trustee and of the Referee to scrutinize with particular care any contract which might lead either party thereto to neglect his duty to his client, particularly where such client is in any sense an officer of the court, such as a Trustee in Bankruptcy. At the same time, the Referee should not lightly hold an agreement between th parties to be illegal or against public policy which is capable of a construction which would make it consistent with the law and valid.

Curtis v. Gokey, 68 N. Y. 300.

In approaching this question, the Referee has considered the circumstances under which the agreement was made [fol. 105] and the purposes sought to be accomplished by the retainer of the defendants and which appear from the evidence.

These circumstances have already been referred to, but it will do no harm to summarize them again. For some two years the Creditors' Committee and the plaintiff had been seeking to preserve the property against the foreclosure of secured liens, in an effort to sell the property to the best advantage, and negotiations for such sales had also been carried on, with favorable prospects; an agreement covering one such sale had been consummated. This effort had been carried on under the protection of a receivership in the State Court of Pennsylvania. That receivership had been held invalid. It was decided that the only course available was to seek the protection of the Bankruptcy Court.

When, therefore, the retainer of the defendants was made, and the subsequent discussions on that subject are considered, it seems proper to consider them in the light of the objects which it was sought to accomplish and not to import into the agreement any purpose which would be inconsistent with that general purpose. Therefore, the Referee considers that the agreement and the interpreta-

tion put upon it by the parties at the time it was made and at the time of the Frick sale, were predicated upon services rendered and to be rendered, in connection with those purposes, namely, the preservation of the estate against foreclosure of secured liens, and the making of contracts for the sale of the property which would be advantageous to the unsecured creditors. In this there was and could be no diversity of interest between the creditors represented by the Creditors' Committee and those not so represented.

[fol. 106] So construed, it seems that there was nothing necessarily illegal or contrary to public policy in the arrangement. Nor in the performance of the agreement do these bounds appear to have been overstepped. There was no conspiracy or plan to bring about the appointment of any special Trustee, nor to collect claims for that purpose, nor to provide for the appointment of counsel for a Trustee to be elected as was true in the case of Marsell v. Maires, 203 A. D. 646. At the time the arrangement was made the plaintiff represented 90% to 95% of the creditors. The interests which he represented were not adverse to the general creditors, for with only a small exception he represented the general creditors. The defendants were his representatives in Pennsylvania. When it came to the selection of Trustees, objection was made to the appointment of Mr. Scrugham, Mr. Untermyer's selection, as sole Trustee, and while there was some discussion as to whether or not this election could have been forced, an agreement was arrived at whereby three Trustees were appointed. Upon their appointment they selected counsel for the Trustees and seem to have gone out of their way to select counsel who already represented a large number of creditors. The defendants were Untermyer's representatives with respect to those creditors who had deposited their claims with the Creditors' Committee. Mr. Weil did not at the time he was appointed counsel for the Trustees disclaim that he was acting on behalf of the Creditors' Committee. In fact, he writes to Mr. Untermyer that he considers himself to have been appointed as Mr. Untermyer's representative and testifies that he considers that he continued to represent those interests until the Young-

[fol. 107] Hill deal fell through, which he says occurred

about May 1918. The affairs of this estate were very complicated, and the person most conversant with them from a legal aspect was Mr. Untermyer. The Trustees in selecting the defendants as their counsel must have realized that they were selecting for that position counsel of the Creditors' Committee, and could not have ignored their connection with the plaintiff.

While the courts have at times frowned upon the appointment of counsel for creditors to be counsel to the Trustees, this practice nevertheless has been frequently followed and is no ground for denying compensation.

It has been held that there is no legal objection to permitting the attorney for the Trustee to make and present proof of claim where the bankrupt estate is not prejudiced thereby. In re McKenna, 137 Fed. 611.

Matter of Tieje, (D. C. N. Y.) 263 Fed. 917, where the Court said:

"While counsel for the trustee also represents certain creditors of decedent, who are in most instances also creditors of the bankrupt, the master very properly observed that this should not operate to deny counsel fair compensation for services performed inuring to the benefit of all in interest. It must be kept in mind that all parties entitled to a share in this fund have been benefited in proportion by having this real estate converted into cash and the respective rights determined. It should be added that it is not uncommon for counsel for the trustee to represent creditors of the bankrupt."

[fol. 108] Least of all could such objection be raised in this case, where it appears that all but a small fraction of the creditors were represented by the particular counsel in question and that there was no different status between those creditors who had deposited their claims and those who had not. Moreover, the Trustees appear to have forestalled any complication on this ground by joining with the counsel for the Creditors' Committee to two other counsel, one of whom, Judge Umbel, represented other creditors and the other had at one time acted for the Creditors' Committee. There was no reason to presume when the contract was made, nor as it was subsequently interpreted, that there would be any adverse interest between 95% of the creditors and a remaining 5% who stood in exactly the same

relation to the estate; and if such situation should arise, there were three counsel to the estate, the obvious duty of any one of whom, in such situation, would be to call the attention of the Court to the fact that in any particular instance it would be improper for him to act. In other words, Weil & Thorp were appointed counsel for the Trustees over Weil's own admission practically because they were counsel to the Creditors' Committee and acknowledged that they were appointed as such representatives.

The defendants were on the ground and it was their duty to call the attention of the Court to the arrangement which they had had with the plaintiff if that was necessary. In fact, when the application was made upon the Frick sale, the defendants saw no impropriety in the arrangement as applied to the fees to be received from that sale, but took care, as they properly should have taken care, to see that the Court was apprised that the fees to be paid to [fol. 109] counsel for the Trustees was divided between the various counsel, including also the plaintiff's firm. If the agreement which the plaintiff made applied, as the Referee believes it did, to fees other than the fees in the Frick sale, it was the defendant's duty to do whatever was necessary to bring that matter to the attention of the Court, and if he understood, as I believe he should have understood, that his arrangement with Mr. Untermyer applied to subsequent fees, he could and should have insisted that the subsequent applications to which that agreement applied should also have been made upon the plaintiff's behalf as well as on behalf of the other counsel. In other words, there was nothing in the original arrangement which was not susceptible of being legally carried out, and if it was the defendant's fault that *that* any appropriate steps were not taken to inform the Court of these facts, he cannot now be heard to plead that failure in his own behalf. Unquestionably, Weil & Thorp availed themselves to a large extent of the plaintiff's assistance and services in connection with this estate, which cannot be considered as rendered on behalf of the Creditors' Committee as distinguished from the creditors as a whole.

The defendants have pointed out a number of instances in which they claim that the interests of the Creditors' Committee were adverse to those of the general creditors and that they took a position adverse to the general creditors.

I do not find this to be the fact. The only matter of importance was in connection with proof of claims held by the Creditors' Committee, but the record clearly shows that the only action taken by the Creditors' Committee in this was:

1. To make the formal proof of the assignment of the claim to the Committee and they then referred to counsel [fol. 110] for the specific claimant any objection which might be made to the substance of the claim, and

2. To object that claims filed with the Creditors' Committee and proved in this way could not also be proved by the claimants independently.

I do not consider it important that the Creditors' Committee still continued to exist, which I think was the fact. It certainly fought for its existence when the Laidley suit was brought. The Committee consisted of men of importance and experience, who had knowledge of the situation. They represented a vast number of the creditors and their judgment upon any action with respect to the estate was useful and desirable. There is nothing in this, however, which indicates that their interest was in any way adverse to the other creditors. The plaintiff suggests that some plan of reorganization was or might have been in contemplation which would inure to the benefit of the Creditors' Committee as distinguished from the other creditors. The word "reorganization" does appear here and there through the testimony, but from the time of the commencement of the bankruptcy proceeding there seems to have been no plan and no suggestion of any reorganization in the sense of a sale to the Creditors' Committee. The whole effort both of the Trustees and the Creditors' Committee was to effectuate sales to outside parties which would result in the payment of prior liens and of cash which would be distributable among the creditors and which it would be impossible for the creditors represented by the Creditors' Committee to participate in in a manner different from those not represented by it. The Referee therefore considers that at the time the agreement was made there was nothing intended by the arrangement which would be adverse to the [fol. 111] creditors, whether represented by the Committee or not, nor was there any reason to suppose that any such

condition would arise, nor in fact did any such condition arise. The only potential diversity which would go to the effect of making the agreement under consideration invalid was that in the proof of claims it might be the duty of the Trustees to object to the claims of the Creditors' Committee. This potential diversity would apply equally to other counsel for the Trustees, and as I read the evidence would apply to Mr. Weil himself, who did not cease to represent the Creditors' Committee upon his appointment as counsel to the Trustees. It is obvious that neither Mr. Untermyer nor Judge Umbel could represent the creditors whose claims had been filed in their behalf and also represent the Trustees at the same time. This must have been known to the Trustees when they appointed Judge Umbel and Mr. Weil as their counsel, and when such appointment was approved by the Court. The only objection that I can see to the contract was that it does not seem in terms to have been made known to the Court or to the Referee, but there is no reason to suppose that had the plaintiff or the defendant called the attention of the Court to the arrangement as made that there would have been any objection to the plaintiff sharing in these fees. Certainly the Court's or the Referee's ignorance of the agreement did not tend to increase the allowances to counsel, nor is there anything but commendation by the Referee and the Court for the services rendered to the estate by counsel, in which the plaintiff bore a considerable part, whether or not that fact was known to the Court. In any event, it does not seem to me that the defendants can now contend that the failure to [fol. 112] bring this matter to the attention of the Court on subsequent allowances as they did on the Frick sale can be put forward to defeat the plaintiff's contention.

The cases upon which defendant principally relies—Fried vs. Danziger, 120 A. D. 604, and Marsell vs. Maires, 203 A. D. 646—do not seem to me to apply. The cases involved a very different state of facts. In the latter case there was an agreement between the attorney for the Franklin Brewing Company, against which a petition in bankruptcy had been filed, and the plaintiff whereby the defendant requested the plaintiff to assist him in electing certain Trustees of the bankrupt corporation and thereafter to aid in procuring the appointment of the defendant as the attorney

for the Trustees; and in the event of his appointment as attorney for the Trustees to assist him in all matters which he might be called upon to do. In the event of such appointment the defendant was to pay the plaintiff one-third of all the fees and allowances that might be awarded or received by him. The Court says that:

"Clearly, the purpose of the agreement was to procure the election of certain trustees, whose primary and controlling qualification was that, when elected, they would appoint defendant their attorney to conduct the litigation of the estate * * *. The agreement in question, however, if at all effectual, tested the fitness of the trustees, whose election was to be procured, not by their qualifications as being men of intelligence, honesty and integrity, who would act solely in the interests of the creditors by whom they were elected, but the paramount and controlling consideration was that such trustees, and only such, would be elected, who would appoint the defendant their attorney."

[fol. 113] No such situation existed in the present case. There seems to have been no effort to have any Trustee appointed for any reason other than the best interests of the estate and the agreement was not directed to that end.

Again, the defendants contend that the agreement is vague and indefinite and therefore unenforcible. They cite numerous cases in which the terms of the contracts involved were so vague that it was impossible for the Court to find a method of determining the amount of compensation. It would seem that the defense of indefiniteness does not go to the validity of the contract but to the ability of the Court to enforce it. In the case of McDonald vs. Acker, Merrall & Condit, 192 A. D. 123, where it was held that an agreement to pay "a liberal and very substantial bonus" in addition to a stated salary is too vague, indefinite and uncertain to form the basis of a recovery. If, however, the agreement had been to pay a liberal and substantial bonus to be determined by a person named, and such person had made his determination, there would seem to be no reason why such a contract could not be enforced. The mere fact that the person who makes the determination is one of the parties to the contract and such interest is known and no fraud or bad faith is shown does not limit the power of the Court

to act. The present case seems to come within the reason of the decision in New England Trust Company vs. Abbott, 162 Mass. 248, where the contract provided for the transfer to a corporation of the stock of a stockholder at a price to be fixed by the directors. So here, the agreement that the amount to be allowed to the defendants was to be as much as Mr. Untermyer should fix, Mr. Untermyer having fixed [fol. 114] the amount due, would seem to be enforcible in the absence of fraud or bad faith.

An allowance was made to the counsel for the Trustees after the completion of the Piedmont sale and covering the services theretofore rendered. On September 20, 1920, Mr. Weil reports the allowance by the Court of substantially $300,000 on all the sales which had been made up to and including the Piedmont sale, which wound up the Estate. The proportion going to Weil & Thorp was about $140,000, actually $142,659.98, and in his letter to Mr. Marshall of February 23rd he states that they have 7/15ths of the $300,000, or $140,000, the other 8/15ths going to the other counsel. Up to this point, Mr. Untermyer had never made any determination as to the proportion of the fees received by Weil & Thorp which was to go to Weil & Thorp and to him. Obviously, the amount due to him could not be paid until he made such determination. This decision seems to have been indicated to Mr. Weil for the first time in Mr. Marshall's letter to him of November 15, 1920, in which he says:

"Sam takes the view that he is entitled to a minimum of forty per cent."

As the contract has been construed in this opinion, it was made for the purpose of preserving the estate until the property could be sold, and it seems, therefore, that the arrangement between the parties ended when the final sale was complete, so that, from anything that appears, the only portion of the allowances made to the Trustees in which Mr. Untermyer would have an interest are those covered by the $300,000 payments to the counsel of the Trustees. In any event, it is clear that Mr. Untermyer has [fol. 115] made no determination as to the proportion which he should receive in respect to any of the fees paid since these payments. It does not follow that, because he de-

termined that he was entitled to 40% of the $142,659.98 received by the defendants up to this time, that he would determine that he was entitled to receive the same percentage with regard to fees received by them subsequent to that date. The nature of the services for which the subsequent fees were paid were not known or presented to him until this action was under trial and do not at any time appear to have been considered by him. His determination, however, as to the proportion which he was to receive from the $142,659.98 payment seems to be conclusive in the absence of fraud or bad faith, and the Referee cannot say that such a decision, even in view of the fact that he had received other compensation specially allowed on the Piedmont sale to the Creditors' Committee and their counsel, was improper or excessive. Until the determination by Mr. Untermyer, no amount was due and no interest would run on such amount. Therefore, the Referee finds that the plaintiff is entitled to recover 40% of the amounts received by the defendants from the Trustees up to and including the allowances made in connection with the Piedmont sale. The sum of these amounts is $142,659.98, forty per cent of which is $57,064.

The Referee therefore finds that the plaintiff is entitled to recover from the defendants the sum of $57,064, with interest from November 15, 1920.

Allan Wardwell, Referee.

[fol. 116] In United States District Court

[Title omitted]

Defendants' Exceptions to Referee's Proposed Report

The defendants, A. Leo Weil and Charles M. Thorp, by Stein & Salant, their attorneys, Carter, Ledyard & Milburn, of Counsel, take the following Exceptions to the Proposed Report of the Referee, to whom this case has been referred by an order heretofore made herein, which Report, undated, was delivered to the attorneys for the parties herein on the 6th day of November, 1925, to wit:

1. For that the said Referee erroneously found and stated in the said Proposed Report that a contract substantially as alleged by the plaintiff did exist; whereas he should have found from the pleadings and the evidence, as he in fact states in his Proposed Report, that no contract such as that alleged in the complaint or in the amended complaint did in fact exist; and he should further have found from the [fol. 117] evidence that no such contract as claimed by plaintiff was ever made or did in fact exist.

2. For that the said Referee erroneously found and stated in the said Proposed Report that "this arrangement" (meaning thereby the arrangement made between Samuel Untermyer and the defendants in August and September, 1917), "could properly be applied to fees subsequently allowed to the trustees if in dealing with such fees the parties subsequently understood and interpreted the agreement to apply to such fees"; whereas he should have found from the pleadings and the evidence that the said arrangement was by its terms and by its purpose and intent limited to the fees to be paid to the defendants by the Creditors' Committee for services rendered by the defendants as attorneys and counsel for the Creditors' Committee up to the time that the defendants were appointed as general counsel to the trustees; and whereas he should have found from the pleadings and the evidence and from the terms and nature of said arrangement, that the said arrangement did not include or refer to any fees to the defendants as general counsel to the trustees that might be paid or allowed by the trustees and the court.

3. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's subsequent correspondence with Mr. Marshall constitutes an admission of the receipt by him of Mr. Wickwire's letter of April 26, 1918, Plaintiff's Exhibit 133; whereas he should have found from the evidence that the said letter of Mr. [fol. 118] Wickwire, dated April 26, 1918, Plaintiff's Exhibit 133, was not received by the defendant.

4. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's letter to Mr. Untermyer, dated May 7, 1918, Plaintiff's Ex-

hibit 144, cannot be limited to the construction that the said letter referred only to the Frick fees; whereas he should have found from the said letter and from the evidence that the said letter did in truth and fact refer to the Frick fees only, the only fees then under discussion.

5. For that the said Referee erroneously found and stated in the said Proposed Report that the language of the said letter dated May 7, 1918, Plaintiff's Exhibit 144, is far broader than the fixing of the allowances in connection with the Frick sale and refers to a general arrangement between the parties, but the particular application of this arrangement is to the Frick fees; whereas he should have found from the said letter and from the evidence that the language of the said letter was limited to the fixing of the allowances in connection with the Frick sale and refers to an arrangement between the parties with regard to the allowances in connection with the Frick sale and to those allowances only, even though the language, unexplained by the conditions under which it was written, might be given a broader construction.

6. For that the said Referee erroneously found and stated in the said Proposed Report that at the time of the writing [fol. 119] of the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, no special arrangement had yet been made as to the fixing of the Frick fees; whereas he should have found from the evidence that a special arrangement had then and theretofore been made as to the fixing of the Frick fees, to wit, that after there had been paid and distributed to the associate counsel to the Trustees their respective proportions of the joint allowance made or to be made by the Court for services in connection with the Frick sale, the balance should be paid to the defendants to be divided between the said Untermyer's firm and the defendants in such proportion as the said Samuel Untermyer would designate.

7. For that the said Referee erroneously found and stated in the said Proposed Report that the agreement referred to by the defendant Weil in the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, could only be the agreement made prior to the appointment of the Trustees, which Mr. Weil now interprets to refer to compensation allowed by the

Trustees; whereas he should have found from the evidence that the agreement referred to in the said letter, by reason of the difference in terms and parties and services to be rendered, could not refer to the services to be rendered by defendants to the trustees but referred to the special arrangement made after the Frick sale had been consummated by the Trustees, whereby, after there had been paid and distributed to the associate counsel to the Trustees their respective proportions of the joint allowance made or to be made by the Court for services in connection with the Frick sale, the balance should be paid to the defendants to [fol. 120] be divided between the said Untermyer's firm and the defendants in such proportion as the said Untermyer would designate.

8. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's recognition of the distinction between the compensation allowed to Mr. Untermyer directly in which he (the said Weil) has no interest, and Mr. Untermyer's interest in the fees allowed to counsel to the Trustees, disposes of the contention made by Mr. Weil in respect to the compensation to the counsel of the Creditors' Committee allowed upon the consummation of the Piedmont sale; whereas he should have found that the defendant Weil's recognition of the distinction between the compensation allowed to Mr. Untermyer directly in which he (the said Weil) has no interest and Mr. Untermyer's interest in the fees allowed to counsel to the Trustees, referred solely to the distinction between, on the one hand, the compensation to be allowed to the said Untermyer directly upon his separate application (which was made) for fees and compensation for services rendered by the said Untermyer for the preservation of the estate prior to the bankruptcy, and on the other hand, Mr. Untermyer's interest in the fees to be allowed to the counsel of the trustees jointly, including the said Untermyer's firm, upon their joint application for fees for services in connection with the Frick sale; and whereas he should have found from the evidence that the compensation to counsel of the Creditors' Committee allowed upon the consummation of the Piedmont sale under the Piedmont contract, in express [fol. 121] terms included and covered any and all compensation to the said Untermyer for any services rendered and

assistance given by him to the Trustees after the appointment of the Trustees.

9. For that the said Referee erroneously found and stated in the said Proposed Report that the relations between the said Untermyer and his firm on the one hand and the defendants on the other hand were not broken off so far as the Thompson case was concerned by the correspondence which took place between the said Untermyer and the defendant Weil in May, 1918; whereas he should have found from the evidence and from the said correspondence that it was then mutually agreed between the said Untermyer and the said Weil that they and their respective firms should have no further relations with each other as associate counsel in the Thompson case or any other matter, their subsequent relations being not as associates, but the said Weil representing the trustees and the estate and said Untermyer and his firm representing the Creditors' Committee.

10. For that the said Referee erroneously found and stated in the said Proposed Report that the agreement made between the said Untermyer and the said Weil by their mutual correspondence in May, 1918, that they and their respective firms should have no further relations did not apply to the Thompson case, or if it did, it was not carried into effect, because the correspondence between Mr. Weil and Mr. Untermyer's assistants in connection with the Thompson estate continued thereafter to be practically as active as before; whereas he should have found [fol. 122] from the evidence that the said agreement between the said Untermyer and the defendant Weil was carried into effect and applied to the Thompson case, and that whatever subsequent correspondence there was between the defendant Weil and the said Untermyer's assistants in connection with the Thompson estate thereafter was only such correspondence as the defendant Weil, acting as counsel to the Trustees, had with the assistants of said Untermyer acting as counsel to the Creditors' Committee.

11. For that the said Referee erroneously found and stated in the said Proposed Report that the parties by their correspondence just cited (meaning the correspondence which took place in April and May, 1918) mutually agreed

and understood that the original agreement was meant to and did apply to fees to be received by defendants as counsel for the Trustees; whereas he should have found from the evidence that the parties by their said correspondence did not agree or understand that the original agreement was meant to apply or did apply to fees to be received by defendants as counsel for the trustees; and whereas he should have found from the evidence that the parties by their said correspondence were discussing and referring to the division of fees to be allowed upon the joint petition and application of themselves and the associate counsel to the Trustees in connection with the Frick sale and to these fees only.

12. For that the said Referee erroneously found and stated in the said Proposed Report that there was an agreement between the plaintiff (meaning the said Untermyer) and the defendant with respect to the [fol. 123] distribution of the fees received by the defendants as counsel to the Trustees in the Thompson Estate and that such agreement was that the amount of such fees, when received, should be divided in such manner as Mr. Untermyer should determine, and that this agreement covered the period from the beginning of the bankruptcy proceedings until the time when the properties were sold, and applied to all fees received by the defendants from the trustees during that period; whereas he should have found from the pleadings and the evidence that the only agreement between the said Untermyer and the defendants with respect to the distribution of any fees received by the defendants as counsel to the Trustees was the agreement heretofore referred to with reference to the Frick fees and those fees only.

13. For that the said Referee erroneously found and stated in the said Proposed Report that the alleged agreement claimed by the plaintiff was predicated upon services rendered and to be rendered in connection with the preservation of the estate against foreclosures of secured liens and the making of contracts for the sale of the property which would be advantageous to the unsecured creditors; whereas he should have found from the pleadings and the evidence that the alleged agreement as claimed by the plaintiff was also predicated upon services rendered and to be

rendered by the defendants in connection with securing the appointment of a Trustee named by the said Untermyer, also in connection with obtaining the appointment of counsel to the Trustees who would as such counsel act under the orders and directions of the said Untermyer, and who [fol. 124] would so act under said Untermyer in connection with all matters pertaining to the Thompson estate, and that it was part and parcel of the said agreement alleged by said Untermyer that all such services were to be rendered by the said counsel would be under the orders and directions of the said Untermyer.

14. For that the said Referee erroneously found and stated in the said Proposed Report that there was nothing necessarily illegal or contrary to public policy in the arrangement as claimed by the said Untermyer and as construed by the said Referee; whereas he should have found from the pleadings and the evidence that under the arrangement as claimed by the said Untermyer and as found by the Referee, the defendants, though appointed by the trustees and confirmed by the court, and under the circumstances peculiarly the officers of the court in a most confidential relationship, were nevertheless to subject themselves in the performance of their duties as counsel to the Trustees, to the orders and directions of the said Untermyer, instead of to the orders and directions of the Trustees and of the Court, and he should therefore further have found that the said alleged arrangement, by reason of the fraud and because of its temptations and tendencies, was illegal, unprofessional, contrary to public policy, null and void.

15. For that the said Referee erroneously found and stated in the said Proposed Report that there was no con- [fol. 125] spiracy or plan to bring about the appointment of any special Trustee, nor to collect claims for that purpose, nor to provide for the appointment of counsel for a Trustee to be elected; whereas he should have found from the evidence that under the alleged arrangement as claimed by the said Untermyer it was part and parcel of the alleged arrangement that George R. Scrugham should be appointed sole Trustee, that claims should be collected for that purpose, and that the defendants should be appointed counsel to the Trustees to be elected, and that the defendants

agreed that, upon their appointment as such counsel, they would act under the directions and orders of the said Untermyer; and he should therefore further have found that the said alleged arrangement was illegal, unprofessional, contrary to public policy, null and void.

16. For that the said Referee erroneously found and stated in the said Proposed Report that the interests which the said Untermyer represented were not adverse to the general creditors; whereas he should have found that the interests of creditors whom the said Untermyer represented were in some respects adverse to the interests of the other general creditors and adverse to the interests of the Trustees, in that the Creditors' Committee which the said Untermyer represented were the owners of certain claims which it was to the interest of the Trustees and of the other general creditors who had not assigned their claims to the Creditors' Committee, to oppose and defeat and which claims the Trustees through the defendants and their other counsel, did oppose and defeat.

[fol. 126] 17. For that the said Referee erroneously found and stated in the said Proposed Report that the Trustees seem to have gone out of their way to select counsel who already represented a large number of creditors and that the defendants were Untermyer's representatives with respect to those creditors who had deposited their claims with the Creditors' Committee; whereas he should have found from the evidence that all representation by the said counsel for creditors and any representation by the defendants in behalf of the said Untermyer and with respect to those creditors who had deposited their claims with the Creditors' Committee ceased and came to an end upon their appointment as counsel for the Trustees.

18. For that the said Referee erroneously found and stated in the said Proposed Report that Mr Weil did not at the time he was appointed counsel to the Trustees disclaim that he was acting on behalf of the Creditors' Committee; whereas he should have found from the evidence that Mr. Weil and the defendants did specifically at the time state in writing to, and file with, the Referee and to and

with the Court, a statement to the effect that upon their appointment as general counsel to the Trustees they ceased to represent and no longer represented the Creditors' Committee.

19. For that the said Referee erroneously found and stated in the said Proposed Report that Mr. Weil wrote to Mr. Untermyer that he considered himself to have been appointed as Mr. Untermyer's representative and testified that he considered that he continued to represent those interests until the Young-Hill deal fell through; whereas [fol. 127] he should have found from the evidence that what Mr. Weil wrote and meant by the term "representative" was that he was representing, in accord with Mr. Untermyer and with the Creditors' Committee, the same general purpose to put through the Frick and Young-Hill deals, believing them to be desirable and for the best interests of all the creditors and that he was therefore favorable to the carrying out of those deals.

20. For that the said Referee erroneously found and stated in the said Proposed Report that the Trustees appear to have forestalled any complication on this ground (meaning the ground that the defendants were counsel to the Creditors' Committee) by joining with the counsel for the Creditors' Committee two other counsel, one of whom, Judge Umbel, represented other creditors and the other had at one time acted for the Creditors' Committee; whereas he should have found from the evidence that when the defendants were appointed as counsel to the Trustees, they ceased to represent the Creditors' Committee, and he should further have found that the appointment of the two other counsel to the Trustees had nothing whatever to do with the fact that the defendants had previously been counsel to the Creditors' Committee.

21. For that the said Referee erroneously found and stated in the said Proposed Report that there was no reason to presume when the contract was made, nor as it was subsequently interpreted, that there would be any adverse interest between the Creditors' Committee and the creditors who had not deposited their claims with the Creditors' [fol. 128] Committee; whereas he should have found from the evidence that there was at all times the possibility and

the probability, well known to all of the parties, that some of the claims represented by the Creditors' Committee would be opposed by the Trustees and by the other creditors, and that they were in fact so opposed by the Trustees and by the other creditors and were defeated; and whereas he should further have found from the evidence that under the alleged arrangement as claimed by the said Untermyer and as found by the Referee the defendants would have been bound upon any issue as to such claims deposited with the Creditors' Committee, to act under the directions and orders of the said Untermyer, and as counsel to the Trustees could have been ordered by said Untermyer not to oppose said claims, and that the said alleged arrangement was therefore illegal, unprofessional, contrary to public policy, null and void.

22. For that the said Referee erroneously found and stated in the said Proposed Report that the defendants were on the ground and it was their duty to call the attention of the Court to the arrangement (meaning the arrangement as claimed by the plaintiff) which they had had with the plaintiff (meaning the said Untermyer) if that was necessary; whereas he should have found from the evidence, and did in fact so find, that at the time when the defendants were appointed general counsel to the Trustees there was no such arrangement in existence as that claimed by the plaintiff (the said Referee having assumed the making of said arrangement by the subsequent corre-[fol. 129] spondence), and there was consequently nothing to which the Court's attention could be called; and whereas he should further have found from the evidence and from the law that if such an agreement or arrangement was made as that claimed by the plaintiff, it was illegal, unprofessional, contrary to public policy, null and void, and that the failure to call it to the attention of the Court did not cure its illegal, unprofessional and void character; Justice, for its own protection, and not for the benefit of the parties, striking down all such contracts when the same are brought to its notice.

23. For that the said Referee erroneously found and stated in the said Proposed Report that if the agreement which the plaintiff made applied, as the Referee believes it

did, to fees other than the fees in the Frick sale, it was the defendants' duty to do whatever was necessary to bring that matter to the attention of the Court; whereas he should have found from the evidence and from the law that if the said alleged agreement applied to fees other than the fees in the Frick sale, it was the duty of the said Untermyer who was to have benefited thereby to do whatever was necessary to validate the contract and therefore to bring that matter to the attention of the Court; and whereas he should further have found from the evidence and from the law and for the protection of the administration of justice, that no alleged failure of anybody at the time to bring that matter to the attention of the Court could in any wise affect the illegal and unenforceable nature of that alleged agreement.

[fol. 130] 24. For that the said Referee erroneously found and stated in the said Proposed Report that if the defendant understood, as the Referee believes he should have understood, that his arrangement with Mr. Untermyer applied to subsequent fees, he could and should have insisted that the subsequent applications to which that agreement applied should have been made upon the plaintiff's (meaning the said Untermyer's) behalf as well as on behalf of the other counsel; whereas he should have found from the evidence and from the law that if the said Untermyer made an arrangement with the defendants applying to subsequent fees, it was the business and the duty of the said Untermyer to see to it, and he could and should have insisted, that the subsequent applications to which the alleged agreement applied should be made upon the said Untermyer's behalf as well as on behalf of the other counsel, and that this was not the duty and obligation of the defendants.

25. For that the said Referee erroneously found and stated in the said Proposed Report that there was nothing in the original arrangement which was not susceptible of being legally carried out, and if it was the defendant's fault that any appropriate steps were not taken to inform the Court of those facts, he cannot now be heard to plead that failure in his own behalf; whereas he should have found from the evidence and from the law that the original

arrangement as claimed by the plaintiff, regardless of whether or not it was susceptible of being legally carried out, if in its general tendency it was bad and if it opened the door to temptation, then the law refuses its recogni- [fol. 131] tion, and therefore the alleged arrangement was wholly illegal, unprofessional, contrary to public policy and null and void, and he should further have found from the evidence and from the law that the failure to inform the Court by either or both parties did not and could not cure the illegal, unprofessional and void character of said alleged arrangement, which the court would strike down for the protection of the administration of justice, whenever it found out the character of the arrangement.

26. For that the said Referee erroneously found and stated in the said Proposed Report that Weil and Thorp availed themselves to a large extent of the plaintiff's assistance and services in connection with the Thompson Estate, which cannot be considered as rendered on behalf of the Creditors' Committee as distinguished from the creditors as a whole; whereas he should have found from the evidence that Weil and Thorp availed themselves to a large extent of the plaintiff's (meaning the said Untermyer's) assistance and services only in connection with the Frick sale, and that any other assistance and services rendered by the said Untermyer after the appointment of the Trustees were so rendered by him as counsel to the Creditors' Committee and were fully compensated for by the provision for compensation to the Creditors' Committee and its counsel in the Piedmont Coal Company contract.

27. For that the said Referee erroneously found and stated in the said Proposed Report that the interests of the Creditors' Committee were not adverse to those of the [fol. 132] general creditors and that the Creditors' Committee did not take a position adverse to the general creditors; whereas he should have found from the evidence that the Creditors' Committee continued to remain as owner of certain claims deposited with and assigned to it, which the Trustees and their counsel and other creditors contested and defeated, and that as to such claims, the interests of the Creditors' Committee were adverse to the interests of the Trustees and the other creditors.

28. For that the said Referee erroneously found and stated in the said Proposed Report that at the time the agreement was made there was nothing intended by the arrangement which would be adverse to the creditors, whether represented by the Committee or not, nor was there any reason to suppose that any such condition would arise, nor in fact did any such condition arise; whereas he should have found from the evidence and from the law that at the time when the alleged agreement as claimed by the plaintiff was made, and at all subsequent times, there was a potential diversity of interest between the Creditors' Committee on the one hand and the Trustees and the other creditors on the other hand, which potentiality materialized as to certain creditors represented by said Untermyer; and whereas he should further have found from the evidence and from the law that it is the tendency of the said alleged agreement, and not necessarily some illegal act thereunder, that makes it illegal, unprofessional, contrary to public policy, null and void.

29. For that the said Referee erroneously found and {fol. 133} stated in the said Proposed Report that the potential diversity of interest, arising from the fact that in the proof of claims it might be the duty of the Trustees to object to the claims of the Creditors' Committee, would apply to Mr. Weil himself, who did not cease to represent the Creditors' Committee upon his appointment as counsel to the Trustees; whereas he should have found from the evidence that the potential diversity of interest in no wise applied to Mr. Weil, and that Mr. Weil's retainer and employment by the Creditors' Committee terminated and came to an end upon his appointment as counsel to the Trustees.

30. For that the said Referee erroneously found and stated in the said Proposed Report that the only objection that he can see to the alleged contract as claimed by the plaintiff and as found by the Referee was that it does not seem in terms to have been made known to the Court or to the Referee in Bankruptcy; whereas he should have found from the evidence and from the law that the vital objections to the said alleged contract were and are (1) that it was part and parcel of the alleged contracts as claimed by

the plaintiff that defendants should bring about the selection of the said Untermyer's nominee as sole trustee, (2) that it was also part and parcel of the said alleged contract that defendants should then be appointed as general counsel to the trustees so selected under an agreement to turn over to the said Untermyer so much of the fees allowed them as such counsel as the said Untermyer would designate, (3) that under it the defendants, while acting as general counsel to the Trustees, agreed to subject themselves [fol. 134] to the orders and directions of the said Untermyer, (4) that the defendants would thereby have interests to advance in conflict with their obligations as counsel to the Trustees in that it would be to their interest to be subservient to the wishes, orders and directions of the said Untermyer since the said Untermyer was to determine the amount of their compensation, (5) that the said Untermyer would thereby have a selfish interest to advance in conflict with his duty to the Creditors' Committee in that it would be to his interest not to object to or oppose any applications that defendants might make for fees and allowances as general counsel to the Trustees, regardless of the amount and fairness of the fees and allowances applied for, (6) that the general tendency of any such agreement makes it illegal, unprofessional, contrary to public policy, null and void, because it is opposed to the interests of the public, opens the door to temptation, and makes it easy to contaminate the sources of justice.

31. For that the said Referee erroneously found and stated in the said Proposed Report that there is no reason to suppose that had the plaintiff or the defendant called the attention of the Court to the alleged arrangement as claimed by the plaintiff and as found by the Referee there would have been any objection to the plaintiff sharing in these fees; whereas he should have found from the evidence and from the law that if the attention of the Court had been called to the alleged arrangement as claimed by the plaintiff, the said arrangement would have been declared to be illegal, unprofessional, contrary to public policy, null and void, and he should have found further, as [fol. 135] testified to by one of the trustees, that the witness would not have agreed to the appointment of said general

counsel had he known of any such arrangement as that now claimed by Mr. Untermyer to have been made.

32. For that the said Referee erroneously found and stated in the said Proposed Report that certainly the Court's or the Referee's (meaning the Referee in Bankruptcy) ignorance of the agreement did not tend to increase the allowances to counsel; whereas there is nothing in the evidence to show what allowances the Court and the Referee in Bankruptcy would have made to counsel to the Trustees if they had known that counsel to the Trustees had such an agreement with the said Untermyer as the plaintiff claims.

33. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff (meaning the plaintiff's assignor Samuel Untermyer) bore a considerable part in the performance of the services rendered to the estate by counsel for which the Referee and the court commended counsel; whereas he should have found from the evidence that the services for which the Referee and the court commended counsel were the services rendered by the duly appointed general and associate counsel to the Trustees and that no part thereof consisted of services rendered by the said Untermyer.

34. For that the said Referee erroneously found and stated in the said Proposed Report that it does not seem to him that the defendants can now contend that the failure [fol. 136] to bring this matter to the attention of the Court on subsequent allowances as they did on the Frick sale can be put forward to defeat the plaintiff's contention; whereas he should have found from the evidence and from the law that any failure to bring the alleged agreement as claimed by the plaintiff to the attention of the Court did not and could not cure the illegal, unprofessional and void character of that agreement, which the court would refuse to enforce in the interest of justice.

35. For that the said Referee erroneously found and stated in the said Proposed Report that no such situation existed in the present case as in the case of Marsell v. Mairs, 203 App. Div. 646; whereas he should have found from the evidence and from the law that according to the alleged agreement as claimed by the plaintiff it was part and parcel of that alleged agreement to secure the appoint-

ment of George R. Scrugham as sole Trustee and the appointment of the defendants as counsel for the said Scrugham as sole Trustee, the defendants, however, while such counsel, to act as the representative of the said Untermyer and under the orders and directions of the said Untermyer.

36. For that the said Referee erroneously found and stated in the said Proposed Report that the alleged agreement as claimed by the said Untermyer and as found by the Referee was not vague, indefinite and unenforceable; whereas he should have found from the evidence and from the law that the said alleged agreement was vague, indefinite and unenforceable in that the division of the fees was subject to the determination of one of the parties to the [fol. 137] said alleged agreement, to wit, the said Untermyer.

37. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff is entitled to recover 40% of the amounts received by the defendants from the Trustees up to and including the allowances made in connection with the Piedmont sale; whereas he should have found from the pleadings and the evidence that the plaintiff is entitled to recover no sum whatsoever and that the plaintiff's complaint should be dismissed on the merits.

38. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff is entitled to recover from the defendants the sum of $57,064 with interest from November 15, 1920; whereas he should have found from the pleadings and the evidence that the defendants are entitled to judgment dismissing the complaint upon the merits.

Dated New York, December 11, 1925.

Stein & Salant, Attorney for Defendants. Office & P. O. Address: 1328 Broadway, Borough of Manhattan, City of New York. Carter, Ledyard & Milburn, of Counsel for Defendants. Office & P. O. address: 54 Wall Street, Borough of Manhattan, City of New York.

[fol. 138] In United States District Court

[Title omitted]

Defendants' Proposed Findings of Fact and Conclusions of Law

The defendants, by Messrs. Stein & Salant, their attorneys, Messrs. Carter, Ledyard & Milburn, of counsel, respectfully request the Referee herein to make the following Findings of Fact and Conclusions of Law.

1. At all times hereinafter mentioned, Samuel Untermyer, the plaintiff's assignor, was engaged in the practice of law in the City of New York.

Found. A. W.

2. At all times hereinafter mentioned until on or about the 1st day of December, 1920, the defendants A. Leo Weil and Charles M. Thorp were copartners engaged in the practice of law in the City of Pittsburgh, Pennsylvania, under the firm name and style of Weil & Thorp.

Found. A. W.

3. In the autumn of 1915, Josiah V. Thompson owned a great amount of coal properties in Pennsylvania and West [fol. 139] Virginia and was president and practically the owner of the leading bank at Uniontown, Pennsylvania. He had interests in about 275,000 acres of coal lands partly developed and partly undeveloped. About 30,000 acres of this he owned alone and in the balance he had various fractional interests, there being about 700 associates in the ownership of the properties. His affairs had become much involved and receivers had been appointed of his property by the Court of Common Pleas of Fayette County, Pennsylvania, in January, 1915. There were mortgages on the properties aggregating about $19,000,000. The unsecured creditors were about 1,500 in number with claims aggregating over $15,000,000. Most of the mortgages were past due, the unsecured creditors were threatening suit, and the estate was in great danger of disintegration.

Found. A. W.

4. At the request of one George R. Scrugham, said Samuel Untermyer went to Uniontown, Pennsylvania, in the

autumn of 1915 and held a large meeting of creditors. He suggested the formation of a committee [with drastic powers] with the object of seeing if foreclosure of mortgages and other liens could not be stayed, suits prevented, and the property saved. Such a committee was formed under a Creditors' Committee Agreement dated January 31, 1916, and the said Samuel Untermyer was appointed the counsel for the said Creditors' Committee. A very large proportion of the claims of the unsecured creditors, exceeding [approximately] 90%, were not only deposited with the said Creditors' Committee under the said agree- [fol. 140] ment, but were assigned to said Committee [and it was given the same control thereof substantially as the prior owners had.

Found, except as to matter in brackets and as amended. A. W.

5. From the time of the formation of the said Committee, the Committee and its said counsel negotiated for the sale of all Thompson's various coal properties in bulk and a contract for the sale of all of the said Thompson's properties, except the bank building in Uniontown, Pennsylvania, was made with one Ralph Young, dated June 2, 1917, but the said contract was optional with the said Young and was conditional only. The said contract is variously referred to as the Young Option or the Hill Option.

Found. A. W.

6. In or about August, 1917, and while the said Young Option was still pending, the Supreme Court of Pennsylvania held the receivership proceedings instituted in the Court of Common Pleas of Fayette County [to be invalid and] vacated the receivership. Thompson's secured creditors thereupon threatened to proceed with the foreclosure of their mortgages, attachments and other liens and many of his unsecured creditors threatened to obtain judgments, attachments and other liens.

Found, except matter in brackets not found. A. W.

7. Thereupon and on or about August 21, 1917, the said Samuel Untermyer, acting for and on behalf of the said Creditors' Committee, informed the defendant, A. Leo Weil, of the facts substantially set forth in the foregoing [fol. 141] proposed findings numbered "3," "4," "5" and

"6." He further informed said Weil that he had concluded to institute bankruptcy proceedings against the said Thompson, but that he did not expect the bankruptcy proceedings to be protracted because he hoped and expected that the Young Option would be carried out and if carried out, it would not be necessary to have an adjudication, in any event, if carried out it would assure a composition in bankruptcy that would be satisfactory to all the creditors. The said Untermyer thereupon and on said day retained the defendants in behalf of the said Creditors' Committee, and the said defendants accepted the said retainer, to institute bankruptcy proceedings against the said Thompson, to secure an adjudication in bankruptcy, to act for said Creditors' Committee in the bankruptcy proceedings, which said Untermyer wanted instituted, and in the meanwhile to obtain injunctions and to institute such other proceedings as might be necessary, proper or advisable to prevent the disintegration of the Thompson estate. The said agreement and retainer was limited at the time it was made to the said specific purposes and included no other purposes or objects. It was further agreed that the defendants would perform the said services under the supervision and direction of the said Untermyer for a fee of $5,000 or any other sum that the said Untermyer might decide to be fair and reasonable, the said fee to be paid to the defendants by the said Creditors' Committee.

Refused. A. W.

8. Thereupon and pursuant to the said agreement and retainer, the defendants duly instituted proceedings in in- [fol. 142] voluntary bankruptcy against the said Thompson in the United States District Court for the Western District of Pennsylvania and at or about the same time duly obtained various injunctions and instituted various other proceedings against creditors of the said Thompson to prevent the foreclosure of mortgages, attachments and other liens and to prevent the disintegration of the said Thompson estate.

Refused. A. W.

9. The said Thompson was duly adjudicated a bankrupt on or about the 10th day of September, 1917.

Found. A. W.

10. A large amount of labor was performed by the defendants in the rendition of the services aforesaid and it was thereupon agreed between the said Untermyer and the defendants some time in the month of September, subsequent to the said adjudication in bankruptcy, but prior to the appointment of any trustees in bankruptcy as hereinafter set forth, that the defendants should not be limited to a fee of $5,000 for the said services.

Refused. A. W.

11. The agreement between the said Untermyer and the defendants referred to in the foregoing proposed finding No. "7" and the modification thereof referred to in the foregoing proposed finding No. "10" were the only agreements regarding fees made between the said Untermyer and the defendants until after the consummation of the Frick sale as hereinafter set forth.

Refused. A. W.

[fol. 143] 12. The said agreement and the modification thereof was an agreement for the retainer of the defendants on behalf of the Creditors' Committee, the defendants' actions were to be subject thereunder to the said Untermyer's directions as Counsel of said Creditors Committee, and the defendants were to receive as compensation for their services to the Creditors Committee such amount as the said Untermyer should see fit. When these agreements were made, there was no provision as to who the trustee or trustees in bankruptcy were to be, and there was no arrangement as to who was to be counsel for the trustee or trustees. It was expected that the sale of the entire property except the bank building under the Young Option would go through promptly and that the trustees and their counsel would not have much to do, except to consummate the Young (or so-called Hill) sale.

Refused. A. W.

13. At a meeting duly held of the creditors of the said Thompson, George R. Scrugham, R. M. Hite and D. M. Hartzog were [duly elected and] appointed trustees on or about the 17th day of October, 1917, and their appointment was duly confirmed, and thereupon, on or about the 18th day of October, 1917, the said three trustees duly desig-

nated, and the said District Court for the Western District of Pennsylvania duly ratified and confirmed the designation of, the defendants as general counsel for the said trustees, upon their certification in writing that they did not represent any interests which would be in any way antagonistic or adverse in the event that they were so employed, and Messrs. Umbel, Robinson, McKean & Williams, and Mr. Waitman H. Conaway as associate counsel for the [fol. 144] said trustees, upon their making a substantially similar certification. [The defendants duly accepted their said designation as general counsel to the said trustees, did not thereafter represent creditors except through said trustees, and proceeded to render services as such general counsel, and any and all services thereafter rendered by the defendants in connection with the said Thompson estate were so rendered as such general counsel to the said trustees.]

Found except matters in brackets refused. A. W.

14. At the time of the election and appointment of the said Trustees and thereafter throughout the time of the administration of the Thompson estate, there was in full force and effect in the District Court of the United States for the Western District of Pennsylvania, Rule 5 of Rules in Bankruptcy of said Court, reading as follows:

"Attorney for the Estate and his Duties. Unless specially authorized by the court, receivers and trustees in bankruptcy shall not retain as their attorney, the attorney of the bankrupt, of the petitioning creditors, of the person applying for the appointment of a receiver, or of any creditor, and trustees shall not retain as their attorney any attorney who has obtained proxies or voted upon the election of such trustees, or who is an attorney for persons holding such proxies."

Found. A. W.

[It was to comply with this rule that the certification by the counsel appointed by the trustees referred to in the foregoing finding was made. At no time did the Court [fol. 145] authorize the trustees of the Thompson estate, either specially or otherwise, to retain the said Untermyer or the firm with which he was associated as their attorney

or counsel, and in truth and in fact, the said trustees at no time retained either the said Untermyer or the firm with which he was associated as their attorney or counsel.]

Refused. A. W.

15. Upon the designation of the defendants as general counsel to the Trustees as aforesaid, the employment of the defendants by the said Untermyer to act under his direction for the said Creditors' Committee came to an end and terminated, and said defendants did not undertake thereafter in any manner to act for said Creditors' Committee.

Refused. A. W.

16. At the time of the designation of the defendants as general counsel to the Trustees as aforesaid, there was no agreement or understanding between the said Untermyer and the defendants, express or implied, that the defendants were to be so designated as general counsel to the Trustees, nor was there at said time any agreement or understanding between them, express or implied, that the defendants, while general counsel to the Trustees, would act under the supervision or direction of the said Untermyer, nor was there at said time any agreement or understanding between them, express or implied, that the defendants would pay over to the said Untermyer any part of the fees to be allowed and paid to them as such general counsel.

Refused. A. W.

[fol. 146] 17. Immediately after the election and appointment of the said trustees and the designation by them and the approval by the said District Court of their said counsel, the said trustees and their said counsel proceeded to conclude the sale of that portion of the bank's estate involved in what is known as the Frick Sale. The said Frick Sale had been carved out of the proposed Young sale, and most of the substantial terms thereof had been negotiated prior to the appointment of the said trustees by the said Creditors' Committee and by the said Untermyer as its counsel, and the Receivers theretofore appointed by the Court of Common Pleas of Fayette County, had executed a contract therefor, [which had been accepted] prior to the removal of said Receivers.

Found as amended. A. W.

18. Upon the consummation of the said Frick Sale, it was determined to make an application for counsel fees out of the proceeds thereof, for services rendered in connection therewith. Thereupon and pursuant to agreement between the defendants, the said associate counsel and the said Untermyer, a joint petition and application for counsel fees was presented in the name of the defendants, of the said associate counsel, and of the firm with which the said Untermyer was associated, to be paid to them jointly out of the proceeds of the said Frick Sale for services rendered in connection therewith; [it was further agreed between the defendants and the said Untermyer that out of the balance remaining after payment to the said associate counsel of their proportionate parts, so much thereof would be paid to the firm with which the said Untermyer [fol. 147] was associated as the said Untermyer should designate].

Found. A. W.

Matters in brackets refused. A. W.

19. Thereafter the Court awarded to the said joint petitioners upon their said joint petition and application the sum of $40,000 out of the proceeds of the Frick Sale for their services in connection therewith and the sum of $17,000 thereof was agreed upon as the amount to be paid to the associate counsel, leaving a balance of $23,000 for distribution between the defendants and the said Untermyer or his firm. Defendants thereupon repeatedly requested the said Untermyer to fix and designate the proportion of the said sum of $23,000 that he desired to be paid to the firm with which he was associated, but the said Untermyer did not do so and has not done so. On the other hand, defendants have not demanded from the said Untermyer or from said Creditors' Committee compensation for the services rendered as aforesaid by the defendants prior to their designation as general counsel to the Trustees, and the defendants have received no compensation for their said services.

Refused. A. W.

20. The expected sale of the bulk of the Thompson properties under the Young Option was never consummated [and was abandoned], and the expected composition in bankruptcy did not take place.

Found, except matter in brackets. A. W.

21. In or about the month of May, 1918, a serious personal disagreement occurred between the said Untermyer [fol. 148] and the defendant Weil, arising out of the matter not connected with the Thompson estate, of such a nature as to make further personal relations between them impracticable and impossible, and it was thereupon agreed between the said Untermyer and the defendant Weil that they and their respective firms should have no further professional relationship of any kind with each other.

Refused. A. W.

22. The administration in bankruptcy of the Thompson Estate continued in regular course, and further sales of small portions of the estate known as the Rockwell and Dorsey Sales were negotiated and made by the trustees, and in or about the month of June, 1919, the sale of the entire remainder of the said estate, constituting the bulk thereof, was made by the trustees to the Piedmont Coal Company under a contract approved, among others, by the said Creditors' Committee and by the said Untermyer, whereby it was provided that the purchasers, in addition to paying to the trustees the purchase price therein named, would also pay to the said Creditors' Committee in full for the services of the said Creditors' Committee and of the said Untermyer as its counsel prior to the bankruptcy and for such assistance as the Creditors' Committee and its said counsel had rendered to the trustees since the adjudication in bankruptcy, an amount not exceeding the sum of $360,000. The said contract of purchase and sale was duly ratified and approved by the said District Court, and the purchasers did thereupon pay to the said Creditors' Committee, pursuant thereto, the greater part of the said [fol. 149] sum of $360,000 and will pay the balance thereof upon the fulfillment of certain conditions in said contract or purchase and sale specified.

Refused. A. W.

23. At no time did the defendants or either of them make any agreement with the said Untermyer for the payment to the said Untermyer or to his firm of any part of the fees allowed or to be allowed to the defendants as general

counsel to the trustees, except as hereinbefore stated with respect to the fees allowed for joint services in connection with the Frick Sale.

Refused. A. W.

24. After the election and appointment of the trustees as hereinbefore stated, the said Creditors' Committee continued to act and to function, and the said Untermyer continued to act as counsel to the said Creditors' Committee, and the professional services rendered by said Untermyer and the firm of Guggenheimer, Untermyer and Marshall with which he was connected, and his and their associates, were rendered for and on account of said Creditors' Committee and for and on account of the claims upon the bankrupt estate which had been assigned by creditors to said Creditors' Committee, and not as counsel or attorneys for said Trustees.

Refused. A. W.

25. Any services rendered by the said Untermyer or Guggenheimer, Untermyer and Marshall, the firm with which he was associated, after the appointment of the [fol. 150] trustees were so rendered by him and them as counsel and attorneys of the Creditors' Committee, and the said Untermyer agreed to accept as compensation for the said services rendered after the appointment of the trustees and for such services as he and they rendered prior to the bankruptcy, such sum as he and the Creditors' Committee might agree upon out of the sum of $360,000 stipulated in the said Piedmont Coal Company contract.

Refused. A. W.

26. The claims of the creditors who had deposited their claims with and assigned same to the Creditors' Committee were filed with the Trustees by the Creditors' Committee through the said Untermyer as its counsel. Many of the said claims were objected to and contested by the trustees and their counsel, whereupon the said Creditors' Committee, through the said Untermyer, nevertheless insisted upon retaining possession of and title to the said claims and of defending the regularity of the deposit and assignment thereof to the Creditors' Committee and of the regularity of the filing of proofs of the said claims by the Creditors' Committee with the trustees, but left the prose-

cution of the said claims on the merits otherwise to personal counsel selected by such creditors; a number of said claims so contested were rejected in whole or in part.

Refused. A. W.

27. Other creditors who had deposited their claims with and assigned them to the Creditors' Committee sought to withdraw the same from the Creditors' Committee and to [fol. 151] make independent proof in their own names of their said claims before the trustees, but the Creditors' Committee through the said Untermyer opposed such action on the part of said creditors.

Refused. A. W.

28. Up to on or about October 27, 1920, there was allowed and paid to the defendants for their services as general counsel to the trustees the sum of $142,659.98. Thereupon the said Untermyer demanded of the defendants that they pay over to him 40% of the said sum.

Found. A. W.

When the said demand was first made it was placed upon the ground that the said Untermyer was entitled thereto because he had brought the defendants into the Thompson matter and had introduced the said business to the defendants and was entitled thereto because of the relationship of the parties as corresponding attorneys. Thereafter the said Untermyer demanded 40% of the said sum on the ground of an alleged agreement between him and the defendant Weil, whereby the defendants had agreed that, while general counsel to the trustees, they would act under the orders and directions of the said Untermyer, and had further agreed to pay over to the said Untermyer such proportion as he should fix and designate out of any allowances to be made and paid to the defendants as general counsel to the trustees. The defendants denied that any such agreement, express or implied, had ever been made and refused to pay over to the said Untermyer any sum whatsoever on the basis of any such alleged agreement, and [fol. 152] further contended that such an agreement, if made, would have been unprofessional, contrary to public policy, a fraud upon the Court, and null and void.

Refused. A. W.

29. The said Untermyer [thereupon] assigned his alleged claims against the defendants to the plaintiff herein, but there was no assignment to the plaintiff from the firm with which the said Untermyer was associated, to wit, the firm of Guggenheimer, Untermyer & Marshall.

Found except word thereupon. A. W.

30. The plaintiff herein [thereupon] instituted this action as assignee of the said Untermyer under a summons and complaint in which the said Untermyer's alleged claim was specifically placed upon the ground of the said alleged agreement.

Found except word thereupon. A. W.

31. The firm of Weil & Thorp was dissolved on the 1st day of December, 1920. The defendant Weil thereafter continued to render services as general counsel to the trustees in the general course of the administration of the bankrupt estate and for the said services, [which did not include services in connection with any sales of the property of the bankrupt estate and had no reference to preventing disintegration of the estate,] there was allowed and paid to the defendant Weil the sum of $21,000 on or about November 30, 1921, and the further sum of $23,333.31 on or about May 10, 1924. During the trial of this action before the Referee herein, the said Untermyer and plaintiff as his assignee made claim to a portion of the said allowances [fol. 153] and it was thereupon stipulated that the Referee might hear and determine the said claim with the same force and effect as if it had been included in the original complaint herein, and upon motion of plaintiff an amended complaint was thereupon served and filed herein under which the plaintiff set forth his claim to a share of the said additional allowances.

Found except matter in brackets. A. W.

32. There is no substantial evidence in this case to support a judgment on the issues involved herein in favor of the plaintiff.

Refused. A. W.

Conclusion of Law

1. There was no agreement made by the defendants with Samuel Untermyer or with the firm with which said Unter-

myer was associated for the division of any allowances made for services rendered to the trustees in bankruptcy, saving and excepting the agreement between the defendants and the firm with which the said Untermyer was associated, to wit, the firm of Guggenheimer, Untermyer & Marshall, for the division of fees allowed for services in connection with the Frick Sale.

Refused. A. W.

2. The alleged agreement set forth in the complaint and in the amended complaint herein and claimed by the plaintiff to have been made between the said Untermyer and the defendants regarding the division between the said Untermyer and the defendants of the fees allowed to the defend-
[fol. 154] ants as general counsel to the trustees was unprofessional, contrary to public policy, illegal, and null and void.

Refused. A. W.

3. The validity of such an agreement as that alleged and set forth in the complaint and in the amended complaint herein filed, and testified to by Mr. Untermyer to have been made between the said Untermyer and the defendants, regarding the division between the said Untermyer and the defendants of the fees to be allowed to the defendants as general counsel for the trustees, is to be determined not by what said parties did thereunder, but by the general tendency of such an agreement. If that is opposed to the interests of the public, the agreement is void, even though in that particular case the intent of the parties may have been good and no injury to the public may have resulted. It matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The law looks to the general tendency of such contracts, and it closes the door to temptation by refusing them recognition in any of the courts of the country. It is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results.

Refused. A. W.

4. When such a contract or agreement as that alleged in the complaint or the amended complaint filed in this case, or in the testimony of the plaintiff, is brought to the atten-

tion of the Court, it is the duty of the Court to refuse to [fol. 155] enforce such contracts or agreements, for the protection of the administration of justice, regardless of how it may affect the interests of either party to said attempt to enforce said agreement, whether plaintiff or defendant.

Refused. A. W.

5. The alleged agreement set for in the complaint and in the amended complaint herein and claimed by the plaintiff to have been made between the said Untermyer and the defendants regarding the division between the said Untermyer and the defendants of the fees allowed to the defendants as general counsel to the trustees was vague, indefinite and unenforceable.

Refused. A. W.

5a. There is no substantial evidence in this case to support a judgment on the issues involved herein in favor of the plaintiff.

Refused. A. W.

6. The complaint should be dismissed upon the merits and judgment should be entered accordingly.

Refused. A. W.

Dated New York, December 12, 1925.

——— ———, Referee.

[fol. 156] In United States District Court

[Title omitted]

Plaintiff's Proposed Findings of Fact and Conclusions of Law

The plaintiff, Edward M. Neary, by Guggenheimer, Untermyer & Marshall, his attorneys, respectfully submits the following proposed findings of fact and conclusions of law.

Findings of Fact

1. At all the times hereinafter mentioned the defendants, A. Leo Weil and Charles M. Thorp, were copartners engaged in the practice of law in the City of Pittsburgh, State

of Pennsylvania, under the firm name and style of Weil & Thorp.

Found. A. W.

2. At all the times hereinafter mentioned the plaintiff's assignor, Samuel Untermyer, was engaged in the practice of law in the City of New York, State of New York.

Found. A. W.

[fol. 157] 3. Prior to the commencement of this action, Samuel Untermyer duly assigned and transferred to the plaintiff all of his right, title and interesst in the cause of action set forth in the complaint and amended complaint herein and the plaintiff is the owner thereof.

Found. A. W.

4. Prior to the month of August, 1917, and in or about 1915, plaintiff's assignor was retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pa., where he was engaged in the business of a banker and in the operation of coal mines, to enable the said creditors to collect from the said Thompson and out of his property his indebtedness to them, which amounted to many millions of dollars. The affairs of the said Thompson were greatly involved, and it was agreed in the interests of his creditors that the extensive properties of the said Thompson should be conserved so that they might be applied equitably to the payment of the claims of his creditors.

Found. A. W.

5. In or about January, 1915 such proceedings were had that receivers of the estate of said Thompson were appointed by the Court of Common Pleas of Fayette County, Pennsylvania, and during the pendency of such receivership said estate was protected from being disrupted by the action of hostile lienors who sought to dispose of its assets under circumstances which would have resulted in a sacrifice of the interests of the creditors of said Thompson, and such assets were conserved principally through the [fol. 158] instrumentality of plaintiff's assignor, who represented from 90% to 95% of the creditors of said Thompson, whose claims aggregated approximately $15,000,000.00.

Found. A. W.

6. The receivership aforesaid having been set aside by virtue of a decision of the Supreme Court of Pennsylvania on May 7th, 1917, plaintiff's assignor acting under instructions of the creditors by whom he had been retained and for the benefit of all of the creditors of the said bankrupt being satisfied that the general creditors of the said Thompson could only be protected from the disruption, disintegration and sacrifice of the estate of said Thompson which would have resulted from forced sales on the foreclose of mortgages and other liens and similar sales under execution upon judgments recovered against said bankrupt by the action of a court in bankruptcy, determined to institute such bankruptcy proceedings. To that end he explained to defendants the facts relating to said estate and informed them of his plans looking to the protection of the creditors and the conservation of the estate of said Thompson and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five thousand ($5,000) Dollars.

Found.—A. W.

7. Prior to said retainer of the defendants by plaintiff's assignor, the defendants had had no interest in, or connec-
[fol. 159] tion with said Thompson his Estate or his creditors.

Found. A. W.

8. Upon the understanding and agreement aforesaid, bankruptcy proceedings were duly instituted on the petition of the three of the creditors of the said Thompson in the District Court for the Western District of Pennsylvania for his adjudication as a bankrupt, and thereupon such proceedings were had, that on or about September 10, 1917, the said Thompson was adjudicated a bankrupt and trustees of his estate were duly appointed and the said Estate was thereupon administered in such bankruptcy proceedings, the defendants herein acting at the instance of plaintiff's assignor and for the creditors represented by him whose interests were identical with those of the general creditors of the said Thompson.

Found. A. W.

9. The affairs of the Thompson Estate were very complicated and the plaintiff's assignor was the person most conversant with them from the legal aspect. The trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendants' connection with plaintiff's assignor in relation to such creditors.

Found. A. W.

10. In the course of the administration of the Estate of the said Thompson, various complications arose which pro- [fol. 160] longed the period of the administration of the Estate beyond that contemplated at the time of the institution of the said bankruptcy proceedings and which rendered it necessary for the defendants and plaintiff's assignor and of the firm of Guggenheimer, Untermyer & Marshall, who acted for the plaintiff's assignor, together to perform services, which in extent and laboriousness exceeded those which it was originally believed it would be necessary for the defendants to perform in the course of the administration of the said estate in bankruptcy.

Found. A. W.

11. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that they should together perform such services and that the compensation of the defendants for services in such bankruptcy proceedings was not to be limited to the sum of Five thousand ($5,000) dollars as theretofore stipulated, and in lieu of the compensation originally stipulated, it was mutually agreed that plaintiff's assignor and defendants should collaborate in rendering such services as were necessary and proper in such bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt and that the defendants were to receive for the services so to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him.

Found. A. W.

[fol. 161] 12. Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, who acted for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor, by the trustees in bankruptcy upon the sale thereof, for which allowances were made in such bankruptcy proceedings by the District Court of the United States for the Western District of Pennsylvania to the defendants at various times, between September 3, 1918, and October 27, 1920, to an aggregate amount received by them for such services of $142,659.98, a substantial part of the services for which said allowances were made having been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him.

Found. A. W.

13. On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 28, 1920, the plaintiff's assignor on or about November 15, 1920, pursuant to the aforesaid agreement, [and after giving due consideration to the nature and character of the services rendered by the defendants and by himself and by the firm of Guggenheimer, Untermyer & Marshall, acting for him, in the aforesaid bankruptcy proceedings,] determined [in good faith that a fair and reasonable] the division of the sum of $142,659.98 theretofore received by the defendants as aforesaid, was that the defendants should re-[fol. 162] tain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision, [which were in all respects reasonable and equitable and commensurate with the relative services rendered as aforesaid.]

Found omitting portions in brackets which are not found. A. W.

14. Thereafter the defendants, [although for a long time admitting and recognizing the right of plaintiff's assignor in the premises, and after seeking to induce him to make a larger allowance to them,] refused to comply with his de-

termination and although he demanded that they pay over to him 40% of the sum so received by them, they refused to pay him such sum or any part thereof, and they are now indebted to the plaintiff therefor in the sum of $57,064.00 with interest from November 15, 1920.

Found except portions in brackets which is not found. A. W.

15. On or about November 30, 1920, the firm of Weil & Thorp having been dissolved, the defendant Weil succeeded said firm in the aforesaid bankruptcy proceedings and on or about November 30th, 1921, a further allowance in said proceedings was made to him in the sum of $21,000 and on or about May 10, 1924, a further and additional allowance was made to him to the extent of $23,333.31 and further and additional allowances will be sought by him on the winding up of the said estate in bankruptcy. A. W.

[fol. 163] 16. During the pendency of the trial hereof, plaintiff's assignor for the first time learned of the payment to the defendant Weil of the allowances referred to in the foregoing finding, and the complaint was amended so as to include a claim by plaintiff for forty percentum (40%) of such amounts. The plaintiff, however, failed to prove that his assignor had made any determination as to the division of the amounts received by the defendant Weil subsequent to October 27th, 1920, between himself and the said Weil. Consequently, there can be no recovery as to said sum in this action.

Found. I also find that the contract between Untermyer and the defendants was limited to the preservation of the Estate and come to an end with the Piedmont sale. A. W.

17. By a stipulation entered on the minutes herein it was agreed that any judgment to be entered herein in favor of the plaintiff shall run as against both defendants as to all sums received by them to December 1st, 1920, on account of the allowances made in the bankruptcy proceedings and that as to all allowances made therein to the defendants or either of them subsequent to December 1st, 1920, any judgment to be entered herein on behalf of the plaintiff shall run against the defendant, A. Leo Weil, only.

Found. A. W.

18. On December 4, 1923, it was stipulated and agreed in writing on behalf of the parties hereto that the trial of this case should be referred to Allen Wardwell, Esq., as ref- [fol. 164] eree, to hear, try and determine the same, with all the powers to act and rule upon said trial possessed by the Court, that the fees of the referee and of the stenographer should be included and taxed in this action, and that an order might be entered thereon by either party without further notice, and thereafter and on December 10, 1923, pursuant to said stipulation an order was duly made at a term of the United States District Court for the Southern District of New York, in conformity with such stipulation.

Found. A. W.

Conclusions of Law

1. The defendants, A. Leo Weil and Charles M. Thorp, are jointly and severally indebted to the plaintiff for 40% of the sum of $142,659.98, being the total allowances received by the defendants on or prior to October 27, 1920, in the proceedings in which Josiah V. Thompson was adjudicated a bankrupt, to wit, the sum of $57,064.00 with interest thereon from November 15, 1920.

Found. A. W.

2. Judgment is directed in favor of the plaintiff against the defendants for $57,064.00, with interest from November 15, 1920, together with the costs of this action, including the Referee's fees and stenographer's minutes.

Respectfully submitted,

Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiff. Office & P. O. Address: 120 Broadway, Borough of Manhattan, New York City.

[fol. 165] In United States District Court

[Title omitted]

Report of Referee

The action having come on before me as Referee and the issues having been tried, and having heard counsel for the

respective parties, after due deliberation I hereby find, report and decide as follows:

Findings of Fact

1. At all the times hereinafter mentioned the defendants, A. Leo Weil and Charles M. Thorp, were co-partners engaged in the practice of law in the City of Pittsburgh, State of Pennsylvania, under the firm name and style of Weil & Thorp.

2. At all the times hereinafter mentioned the plaintiff's assignor, Samuel Untermyer, was engaged in the practice of law in the City of New York, State of New York.

3. Prior to the commencement of this action, Samuel Untermyer duly assigned and transferred to the plaintiff all of his right, title and interest in the cause of action set forth [fol. 166] in the complaint and amended complaint herein and the plaintiff is the owner thereof.

4. Prior to the month of August, 1917, and in or about 1915, plaintiff's assignor was retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pa., where he was engaged in the business of a banker and in the operation of coal mines, to enable the said creditors to collect from the said Thompson and out of his property his indebtedness to them, which amounted to many millions of dollars. The affairs of the said Thompson were greatly involved, and it was agreed in the interests of his creditors that the extensive properties of the said Thompson should be conserved so that they might be applied equitably to the payment of the claims of his creditors.

5. On or about January, 1915, such proceedings were had that receivers of the estate of said Thompson were appointed by the Court of Common Pleas of Fayette County, Pennsylvania, and during the pendency of such receivership said estate was protected from being disrupted by the action of hostile lienors who sought to dispose of its assets under circumstances which would have resulted in a sacrifice of the interests of the creditors of said Thompson, and such assets were conserved principally through the

instrumentality of plaintiff's assignor, who represented from 90% to 95% of the creditors of said Thompson, whose claims aggregated approximately $15,000,000.00.

6. The receivership aforesaid having been set aside by virtue of a decision of the Supreme Court of Pennsylvania [fol. 167] on May 7th, 1917, plaintiff's assignor acting under instructions of the creditors by whom he had been retained and for the benefit of all of the creditors of the said bankrupt being satisfied that the general creditors of the said Thompson could only be protected from the disruption, disintegration and sacrifice of the estate of said Thompson which would have resulted from forced sales on the foreclosure of mortgages and other liens and similar sales under execution upon judgments recovered against said bankrupt by the action of a court in bankruptcy, determined to institute such bankruptcy proceedings. To that end he explained to defendants the facts relating to said estate and informed them of his plans looking to the protection of the creditors and the conservation of the estate of said Thompson and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five thousand ($5,000) Dollars.

7. Prior to said retainer of the defendants by plaintiff's assignor, the defendants had had no interest in, or connection with said Thompson, his Estate or his creditors.

8. Upon the understanding and agreement aforesaid, bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court for the Western District of Pennsylvania for his adjudication as a bankrupt, and thereupon such proceedings were had, that on or about September 10, 1917, [fol. 168] the said Thompson was adjudicated a bankrupt and trustees of his estate were duly appointed and the said Estate was thereupon administered in such bankruptcy proceedings, the defendants herein acting at the instance of plaintiffs' assignor and for the creditors represented by him whose interests were identical with those of the general creditors of the said Thompson.

9. The affairs of the Thompson Estate were very complicated and the plaintiff's assignor was the person most conversant with them from the legal aspect. The trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendant's connection with plaintiff's assignor in relation to such creditors.

10. In the course of the administration of the Estate of the said Thompson, various complications arose which prolonged the period of the administration of the Estate beyond that contemplated at the time of the institution of the said bankruptcy proceedings and which rendered it necessary for the defendants and plaintiff's assignor and of the firm of Guggenheimer, Untermyer & Marshall, who acted for the plaintiff's assignor, together to perform services, which in extent and laboriousness exceeded those which it was originally believed it would be necessary for the defendants to perform in the course of the administration of the said estate in bankruptcy.

11. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that they should together per-[fol. 169] form such services and that the compensation of the defendants for services in such bankruptcy proceedings was not to be limited to the sum of Five thousand ($5,000) Dollars as theretofore stipulated, and in lieu of the compensation originally stipulated, it was mutually agreed that plaintiffs' assignor and defendants should collaborate in rendering such services as were necessary and proper in such bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt and that the defendants were to receive for the services so to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him.

12. The said agreement referred to in Finding 11 applied only to fees for services rendered in connection with the preservation of the bankrupt's estate against forced

sales by mortgages, judgment creditors and other lienors and the sale of the properties of the estate and did not apply to fees for services rendered in connection with the general administration of the estate after all of the properties embraced in the estate had been sold or otherwise disposed of.

13. Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor, and of Guggenheimer, Untermyer & Marshall, who acted [fol. 170] for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor, by the trustees in bankruptcy upon the sale thereof, for which allowances were made in such bankruptcy proceedings by the District Court of the United States for the Western District of Pennsylvania to the defendants at various times, between September 3, 1918, and October 27, 1920, to an aggregate amount received by them for such services of $142,659.98, a substantial part of the services for which said allowances were made having been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him.

14. On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 28th, 1920, the plaintiff's assignor on or about November 15, 1920, pursuant to the aforesaid agreement determined the division of the sum of $142,659.98, theretofore received by the defendants as aforesaid, was that the defendant should retain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision.

15. Thereafter the defendants refused to comply with his determination and although he demanded that they pay over to him 40% of the sum so received by them, they refused to pay him such sum or any part thereof, and they are now indebted to the plaintiff therefor in the sum of $57,063.99 with interest from November 15, 1920.

16. On or about November 30, 1920, the firm of Weil & Thorp having been dissolved, the defendant Weil suc-
[fol. 171] ceeded said firm in the aforesaid bankruptcy proceedings and on or about November 30th, 1921, a further allowance in said proceedings was made to him in the sum of $21,000 and on or about May 10, 1924, a further and additional allowance was made to him to the extent of $23,333.31 and further and additional allowances will be sought by him on the winding up of the said estate in bankruptcy. It does not appear that any of the services rendered by the said Weil after November 30, 1920, and for which the allowances of $21,000 and $23,333.31 were made were rendered in connection with the preservation of the estate against forced sales and the sale of the properties of the estate.

17. During the pendency of the trial hereof, plaintiff's assignor for the first time learned of the payment to the defendant Weil of the allowances referred to in the foregoing finding, and the complaint was amended so as to include a claim by plaintiff for forty per centum (40%) of such amounts. The plaintiff, however, failed to prove that his assignor had made any determination as to the division of the amounts received by the defendant Weil subsequent to October 27th, 1920, between himself and the said Weil.

18. By a stipulation entered on the minutes herein it was agreed that any judgment to be entered herein in favor of the plaintiff shall run as against both defendants as to all sums received by them to December 1st, 1920, on account of the allowances made in the bankruptcy proceedings and that as to all allowances made therein to the defendants or either of them subsequent to December 1st, 1920, any judg-
[fol. 172] ment to be entered herein on behalf of the plaintiff shall run against the defendant, A. Leo Weil, only.

19. On December 4, 1923, it was stipulated and agreed in writing on behalf of the parties hereto that the trial of this case should be referred to Allen Wardwell, Esq., as referee, to hear, try and determine the same, with all the powers to act and rule upon said trial possessed by the Court, that the fees of the referee and of the stenographer should be included and taxed in this action, and that an

order might be entered thereon by either party without further notice, and thereafter and on December 10, 1923, pursuant to said stipulation an order was duly made at a term of the United States District Court for the Southern District of New York, in conformity with such stipulation.

Conclusions of Law

1. The defendants, A. Leo Weil and Charles M. Thorp, are jointly and severally indebted to the plaintiff for 40% of the sum of $142,659.98, being the total allowances received by the defendants on or prior to October 27, 1920, in the proceedings in which Josiah V. Thompson was adjudicated a bankrupt, to wit, the sum of $57,064.00 with interest thereon from November 15, 1920.

2. Judgment is directed in favor of the plaintiff against the defendants for $57,064.00 with interest from November 15, 1920, together with the costs of this action, including the Referee's fees and stenographer's minutes.

Dated New York, January 13th, 1926.

Allen Wardwell, Referee.

[fol. 173] In United States District Court

[Title omitted]

Defendants' Exceptions

The defendants, A. Leo Weil and Charles M. Thorp, by Stein & Salant, their attorneys, Carter, Ledyard & Milburn, of Counsel, take the following exceptions to the Proposed Report and Opinion of the Referee, to whom this case has been referred by an order heretofore made herein, which Report, undated, was delivered to the attorneys for the parties herein on the 6th day of November, 1925, to wit:

1. For that the said Referee erroneously found and stated in the said Proposed Report that a contract substantially as alleged by the plaintiff did exist; whereas he should have found from the pleadings and the evidence, as he in fact states in his Proposed Report, that no contract such

as that alleged in the complaint or in the amended complaint did in fact exist; and he should further have found from the evidence that no such contract as claimed by plaintiff was ever made or did in fact exist.

[fol. 174] 2. For the said Referee erroneously found and stated in the said Proposed Report that "this arrangement" (meaning thereby the arrangement made between Samuel Untermyer and the defendants in August and September, 1917), "could properly be applied to fees subsequently allowed to the trustees if in dealing with such fees the parties subsequently understood and interpreted the agreement to apply to such fees"; whereas he should have found from the pleadings and the evidence that the said arrangement was by its terms and by its purpose and intent limited to the fees to be paid to the defendants by the Creditors Committee for services rendered by the defendants as attorneys and counsel for the Creditors Committee up to the time that the defendants were appointed as general counsel to the trustees; and whereas he should have found from the pleadings and the evidence and from the terms and nature of said arrangement, that the said arrangement did not include or refer to any fees to the defendants as general counsel to the trustees that might be paid or allowed by the trustees and the court.

3. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's subsequent correspondence with Mr. Marshall constitutes an admission of the receipt by him of Mr. Wickwire's letter of April 26, 1918, Plaintiff's Exhibit 133; whereas he should have found from the evidence that the said letter of Mr. Wickwire, dated April 26, 1918, Plaintiff's Exhibit 133, was not received by the defendant.

4. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's let-[fol. 175] ter to Mr. Untermyer, dated May 7, 1918, Plaintiff's Exhibit 144, cannot be limited to the construction that the said letter referred only to the Frick fees; whereas he should have found from the said letter and from the evidence that the said letter did in truth and fact refer to the Frick fees only, the only fees then under discussion.

5. For that the said Referee erroneously found and stated in the said Proposed Report that the language of the said letter dated May 7, 1918, Plaintiff's Exhibit 144, is far broader than the fixing of the allowances in connection with the Frick sale and refers to a general arrangement between the parties, but the particular application of this arrangement is to the Frick fees; whereas he should have found from the said letter and from the evidence that the language of the said letter was limited to the fixing of the allowances in connection with the Frick sale and refers to an arrangement between the parties with regard to the allowances in connection with the Frick sale and to those allowances only, even though the language, unexplained by the conditions under which it was written, might be given a broader construction.

6. For that the said Referee erroneously found and stated in the said Proposed Report that at the time of the writing of the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, no special arrangement had yet been made as to the fixing of the Frick fees; whereas he should have found from the evidence that a special arrangement had then and theretofore been made as to the fixing of the Frick fees, to wit, that after there had been paid and distributed to the associate counsel to the trustees their respective proportions of the [fol. 176] joint allowance made or to be made by the Court for services in connection with the Frick sale, the balance should be paid to the defendants to be divided between the said Untermyer's firm and the defendants in such proportion as the said Samuel Untermyer would designate.

7. For that the said Referee erroneously found and stated in the said Proposed Report that the agreement referred to by the defendant Weil in the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, could only be the agreement made prior to the appointment of the Trustees, which Mr. Weil now interprets to refer to compensation allowed by the Trustees; whereas he should have found from the evidence that the agreement referred to in the said letter, by reason of the difference in terms and parties and services to be rendered, could not refer to the services to be rendered by defendants to the trustees but referred to the special arrangement made after the Frick sale had been consummated by the Trustees, whereby, after there had been paid

and distributed to the associated counsel to the Trustees their respective proportions of the joint allowance made or to be made by the Court for services in connection with the Frick sale, the balance should be paid to the defendants to be divided between the said Untermyer's firm and the defendants in such proportion as the said Untermyer would designate.

8. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's recognition of the distinction between the compensation allowed to Mr. Untermyer directly in which he (the said Weil) has no interest, and Mr. Untermyer's interest [fol. 177] in the fees allowed to counsel to the Trustees, disposes of the contention made by Mr. Weil in respect to the compensation to the counsel of the Creditors Committee allowed upon the consummation of the Piedmont sale; whereas he should have found that the defendant Weil's recognition of the distinction between the compensation allowed to Mr. Untermyer directly in which he (the said Weil) has no interest and Mr. Untermyer's interest in the fees allowed to counsel to the Trustees, referred solely to the distinction between, on the one hand, the compensation to be allowed to the said Untermyer directly upon his separate application (which was made) for fees and compensation for services rendered by the said Untermyer for the preservation of the estate prior to the bankruptcy, and on the other hand, Mr. Untermyer's interest in the fees to be allowed to the counsel of the trustees jointly, including the said Untermyer's firm, upon their joint application for fees for services in connection with the Frick sale; and whereas he should have found from the evidence that the compensation to counsel of the Creditors Committee allowed upon the consummation of the Piedmont sale under the Piedmont contract, in express terms included and covered any and all compensation to the said Untermyer for any services rendered and assistance given by him to the Trustees after the appointment of the Trustees.

9. For that the said Referee erroneously found and stated in the said Proposed Report that the relations between the said Untermyer and his firm on the one hand and the defendants on the other hand were not broken off so far as the Thompson case was concerned by the correspondence

which took place between the said Untermyer and the de-
[fol. 178] fendant Weil in May, 1918; whereas he should have found from the evidence and from the said correspondence that it was then mutually agreed between the said Untermyer and the said Weil that they and their respective firms should have no further relations with each other as associate counsel in the Thompson case or any other matter, their subsequent relations being not as associates, but the said Weil representing the trustees and the estate and said Untermyer and his firm representing the Creditors Committee.

10. For that the said Referee erroneously found and stated in the said Proposed Report that the agreement made between the said Untermyer and the said Weil by their mutual correspondence in May, 1918, that they and their respective firms should have no further relations did not apply to the Thompson case, or if it did, it was not carried into effect, because the correspondence between Mr. Weil and Mr. Untermyers's assistants in connection with the Thompson estate continued thereafter to be practically as active as before; whereas he should have found from the evidence that the said agreement between the said Untermyer and the defendant Weil was carried into effect and applied to the Thompson case, and that whatever subsequent correspondence there was between the defendant Weil and the said Untermyer's assistants in connection with the Thompson estate theraafter was only such correspondence as the defendant Weil, acting as counsel to the Trustees, had with the assistants of said Untermyer acting as counsel to the Creditors Committee.

[fol. 179] 11. For that the said Referee erroneously found and stated in the said Proposed Report that the parties by their correspondence just cited (meaning the correspondence which took place in April and May, 1918) mutually agreed and understood that the original agreement was meant to and did apply to fees to be received by defendants as counsel for the Trustees; whereas he should have found from the evidence that the parties by their said correspondence did not agree or understand that the original agreement was meant to apply or did apply to fees to be received by defendants as counsel for the trustees; and whereas he should have found from the evidence that the

parties by their said correspondence were discussing and referring to the division of fees to be allowed upon the joint petition and application of themselves and the associate counsel to the Trustees in connecton with the Frick sale and to these fees only.

12. For that the said Referee erroneously found and stated in the said Proposed Report that there was an agreement between the plaintiff (meaning the said Untermyer) and the defendant with respect to the distribution of the fees received by defendants as counsel to the Trustees in the Thompson Estate and that such agreement was that the amount of such fees, when received, should be divided in such manner as Mr. Untermyer should determine, and that this agreement covered the period from the beginning of the bankruptcy proceedings until the time when the properties were sold, and applied to all fees received by the defendants from the trustees during that period; whereas he should have found from the pleadings and the evidence that the only agreement between the said Untermyer and the [fol. 180] defendants with respect to the distribution of any fees received by the defendants as counsel to the Trustees was the agreement heretofore referred to with reference to the Frick fees and those fees only.

13. For that the said Referee erroneously found and stated in the said Proposed Report that the alleged agreement claimed by the plaintiff was predicated upon the services rendered and to be rendered in connection with the preservation of the estate against foreclosures of secured liens and the making of contracts for the sale of the property which would be advantageous to the unsecured creditors; whereas he should have found from the pleadings and the evidence that the alleged agreement as claimed by the plaintiff was also predicated upon services rendered and to be rendered by the defendants in connection with securing the appointment of a Trustee named by the said Untermyer, also in connection with obtaining the appointment of counsel to the Trustees who would as such counsel act under the orders and directions of the said Untermyer, and who would so act under said Untermyer in connection with all matters pertaining to the Thompson estate, and that it was part and parcel of the said agreement alleged by said Untermyer that all such services to be rendered by the said counsel

would be under the orders and directions of the said Untermyer.

14. For that the said Referee erroneously found and stated in the said Proposed Report that there was nothing necessarily illegal or contrary to public policy in the arrangement as claimed by the said Untermyer and as con- [fol. 181] strued by the said Referee; whereas he should have found from the pleadings and the evidence that under the arrangement as claimed by the said Untermyer and as found by the Referee, the defendants, though appointed by the trustees and confirmed by the court, and under the circumstances peculiarly the officers of the court in a most confidential relationship, were nevertheless to subject themselves in the performance of their duties as counsel to the Trustees, to the orders and directions of the said Untermyer instead of to the orders and directions of the Trustees and of the Court, and he should therefore further have found that the said alleged arrangement, by reason of the fraud and because of its temptations and tendencies, was illegal, unprofessional, contrary to public policy, null and void.

15. For that the said Referee erroneously found and stated in the said Proposed Report that there was no conspiracy or plan to bring about the appointment of any special Trustee, nor to collect claims for that purpose, nor to provide for the appointment of counsel for a trustee to be elected; whereas he should have found from the evidence that under the alleged arrangement as claimed by the said Untermyer it was part and parcel of the alleged arrangement that George R. Scrugham should be appointed sole Trustee, that claims should be collected for that purpose, and that the defendants should be appointed counsel to the Trustees to be elected, and that the defendants agreed that, upon their appointments as such counsel, they would act under the directions and orders of the said Untermyer; and he should therefore further have found that the said alleged [fol. 182] arrangement was illegal, unprofessional, contrary to public policy, null and void.

16. For that the said Referee erroneously found and stated in the said Proposed Report that the interests which the said Untermyer represented were not adverse to the

general creditors; whereas he should have found that the interests of creditors whom the said Untermyer represented were in some respects adverse to the interests of the other general creditors and adverse to the interests of the Trustees, in that the Creditors' Committee which the said Untermyer represented were the owners of certain claims which it was to the interest of the Trustees and of the other general creditors who had not assigned their claims to the Creditors Committee, to oppose and defeat and which claims the Trustees through the defendants and their other counsel, did oppose and defeat.

17. For that the said Referee erroneously found and stated in the said Proposed Report that the Trustees seem to have gone out of their way to select counsel who already represented a large number of creditors and that the defendants were Untermyer's representatives with respect to those creditors who had deposited their claims with the Creditors' Committee; whereas he should have found from the evidence that all representation by the said counsel for creditors and any representation by the defendants in behalf of the said Untermyer and with respect to those creditors who had deposited their claims with the Creditors' Committee ceased and came to an end upon their appointment as counsel for the Trustees.

[fol. 183] 18. For that the said Referee erroneously found and stated in the said Proposed Report that Mr. Weil did not at the time he was appointed counsel to the Trustees disclaim that he was acting on behalf of the Creditors' Committee; whereas he should have found from the evidence that Mr. Weil and the defendants did specifically at the time state in writing to, and file with, the Referee and to and with the Court, a statement to the effect that upon their appointment as general counsel to the Trustees they ceased to represent and no longer represented the Creditors' Committee.

19. For that the said Referee erroneously found and stated in the said Proposed Report that Mr. Weil wrote to Mr. Untermyer that he considered himself to have been appointed as Mr. Untermyer's representative and testified that he considered that he continued to represent those interests until the Young-Hill deal fell through; whereas he

should have found from the evidence that what Mr. Weil wrote and meant by the term "representative" was that he was representing, in accord with Mr. Untermyer and the Creditors' Committee, the same general purpose to put through the Frick and Young-Hill deals, believing them to be desirable and for the best interests of all the creditors and that he was therefore favorable to the carrying out of those deals.

20. For that the said Referee erroneously found and stated in the said Proposed Report that the Trustees appear to have forestalled any complication on this ground (meaning the ground that the defendants were counsel to the Creditors' Committee) by joining with the counsel for [fol. 184] the Creditors' Committee two other counsel, one of whom, Judge Umbel, represented other creditors and the other had at one time acted for the Creditors' Committee; whereas he should have found from the evidence that when the defendants were appointed as counsel to the Trustees, they ceased to represent the Creditors' Committee, and he should further have found that the appointment of the two other counsel to the Trustees had nothing whatever to do with the fact that the defendants had previously been counsel to the Creditors' Committee.

21. For that the said Referee erroneously found and stated in the said Proposed Report that there was no reason to presume when the contract was made, nor as it was subsequently interpreted, that there would be any adverse interest between the Creditors' Committee and the creditors who had not deposited their claims with the Creditors' Committee; whereas he should have found from the evidence that there was at all times the possibility and the probability, well known to all of the parties, that some of the claims represented by the Creditors' Committee would be opposed by the Trustees and by the other creditors, and that they were in fact so opposed by the Trustees and by the other creditors and were defeated; and whereas he should further have found from the evidence that under the alleged arrangement as claimed by the said Untermyer and as found by the Referee the defendants would have been bound upon any issue as to such claims deposited with the Creditors' Committee, to act under the directions and

orders of the said Untermyer, and as counsel to the Trustees could have been ordered by said Untermyer not to oppose said claims, and that the said alleged arrangement was [fol. 185] therefore illegal, unprofessional, contrary to public policy, null and void.

22. For that the said Referee erroneously found and stated in the said Proposed Report that the defendants were on the ground and it was their duty to call the attention of the Court to the arrangement (meaning the arrangement as claimed by the plaintiff) which they had had with the plaintiff (meaning the said Untermyer) if that was necessary; whereas he should have found from the evidence, and did in fact so find, that the time when the defendants were appointed general counsel to the Trustees there was no such arrangement in existence as that claimed by the plaintiff (the said Referee having assumed the making of said arrangement by the subsequent correspondence), and there was consequently nothing to which the Court's attention could be called; and whereas he should further have found from the evidence and from the law that if such an agreement or arrangement was made as that claimed by the plaintiff, it was illegal, unprofessional, contrary to public policy, null and void, and that the failure to call it to the attention of the Court did not cure its illegal, unprofessional and void character; Justice, for its own protection, and not for the benefit of the parties, striking down all such contracts when the same are brought to its notice.

23. For that the said Referee erroneously found and stated in the said Proposed Report that if the agreement which the plaintiff made applied, as the Referee believes it did, to fees other than the fees in the Frick sale, it was the defendants' duty to do whatever was necessary to bring [fol. 186] that matter to the attention of the Court; whereas he should have found from the evidence and from the law that if the said alleged agreement applied to fees other than the fees in the Frick sale, it was the duty of the said Untermyer who was to have benefited thereby to do whatever was necessary to validate the contract and therefore to bring that matter to the attention of the Court; and whereas he should further have found from the evidence and from the law and for the protection of the administration of justice,

that no alleged failure of anybody at the time to bring that matter to the attention of the Court could in any wise affect the illegal and unenforceable nature of that alleged agreement.

24. For that the said Referee erroneously found and stated in the said Proposed Report that if the defendant understood, as the Referee believes he should have understood, that his arrangement with Mr. Untermyer applied to subsequent fees, he could and should have insisted that the subsequent applications to which that agreement applied should have been made upon the plaintiff's (meaning the said Untermyer's) behalf as well as on behalf of the other counsel; whereas he should have found from the evidence and from the law that if the said Untermyer made an arrangement with the defendants applying to subsequent fees, it was the business and the duty of the said Untermyer to see to it, and he could and should have insisted, that the subsequent applications to which the alleged agreement applied should be made upon the said Untermyer's behalf as well as on behalf of the other counsel, and that this was not the duty and obligation of the defendants.

[fol. 187] 25. For that the said Referee erroneously found and stated in the said Proposed Report that there was nothing in the original arrangement which was not susceptible of being legally carried out, and if it was the defendants' fault that any appropriate steps were not taken to inform the Court of those facts, he cannot now be heard to plead that failure in his own behalf, whereas he should have found from the evidence and from the law that the original arrangement as claimed by the plaintiff, regardless of whether or not it was susceptible of being legally carried out, if in its general tendency it was bad and if it opened the door to temptation, then the law refuses it recognition, and therefore the alleged arrangement was wholly illegal, unprofessional, contrary to public policy and null and void, and he should further have found from the evidence and from the law that the failure to inform the Court by either or both parties did not and could not cure the illegal, unprofessional and void character of said alleged arrangement, which the court would strike down for the protection of the admin-

istration of justice, whenever it found out the character of the arrangement.

26. For that the said Referee erroneously found and stated in the said Proposed Report that Weil and Thorp availed themselves to a large extent of the plaintiff's assistance and services in connection with the Thompson Estate, which cannot be considered as rendered on behalf of the Creditors Committee as distinguished from the creditors as a whole; whereas he should have found from the evidence that Weil and Thorp availed themselves to a large extent of the plaintiff's (meaning the said Untermyer's) assistance and services only in connection with the [fol. 188] Frick sale, and that any other assistance and services rendered by the said Untermyer after the appointment of the Trustees were so rendered by him as counsel to the Creditors Committee and were fully compensated for by the provision for compensation to the Creditors Committee and its counsel in the Piedmont Coal Company contract.

27. For that the said Referee erroneously found and stated in the said Proposed Report that the interests of the Creditors Committee were not adverse to those of the general creditors and that the Creditors Committee did not take a position adverse to the general creditors; whereas he should have found from the evidence that the Creditors Committee continued to remain as owner of certain claims deposited with and assigned to it, which the Trustees and their counsel and the other creditors contested and defeated, and that as to such claims, the interests of the Creditors Committee were adverse to the interests of the Trustees and the other creditors.

28. For that the said Referee erroneously found and stated in the said Proposed Report that at the time the agreement was made there was nothing intended by the arrangement which would be adverse to the creditors, whether represented by the Committee or not, nor was there any reason to suppose that any such condition would arise, nor in fact did any such condition arise; whereas he should have found from the evidence and from the law that at the time when the alleged agreement as claimed by the

plaintiff was made, and at all subsequent times, there was [fol. 189] a potential diversity of interest between the Creditors Committee on the one hand and the Trustees and the other creditors on the other hand, which potentiality materialized as to certain creditors represented by said Untermyer; and whereas he should further have found from the evidence and from the law that it is the tendency of the said alleged agreement, and not necessarily some illegal act thereunder, that makes it illegal, unprofessional, contrary to public policy, null and void.

29. For that the said Referee erroneously found and stated in the said Proposed Report that the potential diversity of interest, arising from the fact that in the proof of claims it might be the duty of the Trustees to object to the claims of the Creditors Committee, would apply to Mr. Weil himself, who did not cease to represent the Creditors Committee upon his appointment as counsel to the Trustees; whereas he should have found from the evidence that the potential diversity of interest in no wise applied to Mr. Weil, and that Mr. Weil's retainer and employment by the Creditors Committee terminated and came to an end upon his appointment as counsel to the Trustees.

30. For that the said Referee erroneously found and stated in the said Proposed Report that the only objection that he can see to the alleged contract as claimed by the plaintiff and as found by the Referee was that it does not seem in terms to have been made known to the Court or to the Referee in Bankruptcy; whereas he should have found from the evidence and from the law that the vital objections to the said alleged contract were and are (1) that it was [fol. 190] part and parcel of the alleged contract as claimed by plaintiff that defendants should bring about the selection of the said Untermyer's nominee as sole trustee, (2) that it was also part and parcel of the said alleged contract that defendants should then be appointed as general counsel to the trustee so selected under an agreement to turn over to the said Untermyer so much of the fees allowed them as such counsel as the said Untermyer would designate, (3) that under it the defendants, while acting as general counsel to the Trustee, agreed to subject themselves to the orders and directions of the said Untermyer, (4) that the defendants

would thereby have interests to advance in conflict with their obligations as counsel to the Trustees in that it would be to their interest to be subservient to the wishes, orders and directions of the said Untermyer since the said Untermyer was to determine the amount of their compensation, (5) that the said Untermyer would thereby have a selfish interest to advance in conflict with his duty to the Creditors Committee in that it would be to his interest not to object to or oppose any applications that defendants might make for fees and allowances as general counsel to the Trustees, regardless of the amount and fairness of the fees and allowances applied for, (6) that the general tendency of any such agreement makes it illegal, unprofessional, contrary to public policy, null and void, because it is opposed to the interests of the public, opens the door to temptation, and makes it easy to contaminate the sources of justice.

31. For that the said Referee erroneously found and stated in the said Proposed Report that there is no reason to suppose that had the plaintiff or the defendant called the [fol. 191] the attention of the Court to the alleged arrangement as claimed by the plaintiff and as found by the Referee there would have been any objection to the plaintiff sharing in these fees; whereas he should have found from the evidence and from the law that if the attention of the Court had been called to the alleged arrangement as claimed by the plaintiff, the said arrangement would have been declared to be illegal, unprofessional, contrary to public policy, null and void, and he should have found further, as testified to by one of the trustees, that the witness would not have agreed to the appointment of said general counsel had he known of any such arrangement as that now claimed by Mr. Untermyer to have been made.

32. For that the said Referee erroneously found and stated in the said Proposed Report that certainly the Court's or the Referee's (meaning the Referee in Bankruptcy) ignorance of the agreement did not tend to increase the allowances to counsel; whereas there is nothing in the evidence to show what allowances the Court and the Referee in Bankruptcy would have made to counsel to the Trustees if they had known that counsel to the Trustees had

such an agreement with the said Untermyer as the plaintiff claims.

33. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff (meaning the plaintiff's assignor Samuel Untermyer) bore a considerable part in the performance of the services rendered to the estate by counsel for which the Referee and the court commended counsel; whereas he should have found from the evidence that the services for which the Referee and *and* the court commended counsel were the services rendered by the duly appointed general and associate coun[fol. 192] sel to the Trustees and that no part thereof consisted of services rendered by the said Untermyer.

34. For that the said Referee erroneously found and stated in the said Proposed Report that it does not seem to him that the defendants can now contend that the failure to bring this matter to the attention of the Court on subsequent allowances as they did on the Frick sale can be put forward to defeat the plaintiff's contention; whereas he should have found from the evidence and from the law that any failure to bring the alleged agreement as claimed by the plaintiff to the attention of the Court did not and could not cure the illegal, unprofessional and void character of that agreement, which the court would refuse to enforce in the interest of justice.

35. For that the said Referee erroneously found and stated in the said Proposed Report that no such situation existed in the present case as in the case of Marsell v. Mairs, 203 App. Div. 646; whereas he should have found from the evidence and from the law that according to the alleged agreement as claimed by the plaintiff it was part and parcel of that alleged agreement to secure the appointment of George R. Scrugham as sole Trustee and the appointment of the defendants as counsel for the said Scrugham as sole Trustee, the defendants, however, while such counsel, to act as the representative of the said Untermyer and under the orders and directions of the said Untermyer.

36. For that the said Referee erroneously found and stated in the said Proposed Report that the alleged agreement as claimed by the said Untermyer and as found by the

[fol. 193] Referee was not vague, indefinite and unenforceable; whereas he should have found from the evidence and from the law that the said alleged agreement was vague, indefinite and unenforceable in that the division of the fees was subject to the determination of one of the parties to the said alleged agreement, to wit, the said Untermyer.

37. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff is entitled to recover 40% of the amounts received by the defendants from the Trustees up to and including the allowances made in connection with the Piedmont sale; whereas he should have found from the pleadings and the evidence that the plaintiff is entitled to recover no sum whatsoever and that the plaintiff's complaint should be dismissed on the merits.

38. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff is entitled to recover from the defendants the sum of $57,064 with interest from November 15, 1920; whereas he should have found from the pleadings and the evidence that the defendants are entitled to judgment dismissing the complaint upon the merits.

And the said defendants take the following exceptions to the report of the Referee, dated January 13, 1926, to wit:

39. They except to so much of the finding of fact numbered "4" in the said Report as finds that the plaintiff's assignor was retained as attorney and counsel for a large [fol. 194] number of creditors of Josiah V. Thompson, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that plaintiff's assignor was retained as attorney and counsel for a Creditors' Committee of the creditors of the said Josiah V. Thompson, and not for the creditors of the said Josiah V. Thompson.

40. They except to so much of the finding numbered "5" in the said Report as finds that plaintiff's assignor represented from 90% to 95% of the creditors of said Thompson, upon the ground that the said finding is against the weight

of the evidence and without evidence to support it, and he should have found from the evidence that the plaintiff's assignor represented the said Creditors' Committee and not the creditors of said Thompson.

41. They except to so much of the finding numbered "6" in the said Report as finds that plaintiff's assignor acted under instructions of the creditors and for the benefit of all of the creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that plaintiff's assignor acted under the instructions of the said Creditors' Committee and for the benefit of the creditors who had deposited their claims with the said Creditors' Committee.

42. They except to so much of the finding numbered "6" in the said Report as finds that plaintiffs' assignor retained the defendants to conduct bankruptcy proceedings under his supervision, upon the ground that the said finding is [fol. 195] against the weight of the evidence and without evidence to support it, and he should have found from the evidence that plaintiff's assignor retained defendants to institute bankruptcy proceedings against said Thompson, to secure an adjudication in bankruptcy, to act for said Creditors' Committee in the bankruptcy proceedings, and in the meanwhile to obtain injunctions and to institute such other proceedings as might be necessary, proper or advisable to prevent the disintegration of the Thompson estate; and he should further have found from the evidence that the said retainer was limited at the time it was made to the said specific purposes and included no other purposes or objects.

43. They except to so much of the finding numbered "8" in the said Report as finds that bankruptcy proceedings were instituted upon the understanding and agreement as aforesaid (meaning the understanding and agreement referred to in the finding numbered "6"); upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the said bankruptcy proceedings were instituted upon the understanding and agree-

ment that the defendants would institute the same to secure an adjudication in bankruptcy, to act for the Creditors' Committee in the bankruptcy proceedings, and in the meanwhile to obtain injunctions and to institute such other proceedings as might be necessary, proper or advisable to prevent the disintegration of the Thompson estate and that the understanding and agreement under which the said bankruptcy proceedings were instituted was limited to the said specific purposes and included no other purposes or objects.

[fol. 196] 44. They except to so much of the finding numbered "8" in the said Report as finds that after the appointment of the Trustees the defendants acted at the instance of plaintiff's assignor and for the creditors represented by plaintiff's assignor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that after the appointment of the Trustees the defendants were duly appointed by the Trustees as counsel to the Trustees and their said appointment as counsel to the Trustees was duly ratified by the Court and that from that time forth the defendants acted solely as such counsel to the Trustees and not in any other capacity; and he should further have found from the evidence that upon the appointment of the defendants as counsel to the Trustees their retainer by the plaintiff's assignor in behalf of the Creditors' Committee ceased and terminated, and from that time forth the defendants acted solely as counsel to the Trustees and in no other capacity.

45. They except to so much of the finding numbered "8" in the said Report as finds that the interests of the creditors represented by the plaintiff's assignor were identical with those of the general creditors of the said Thompson, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the interests of the Creditors' Committee represented by the plaintiff's assignor and of the creditors who had deposited their claims with the said Creditors' Committee were in some respects identical with and in other respects contrary to the interests [fol. 197] of the general creditors of the said Thompson.

46. They except to so much of the finding numbered "9" in the said Report as finds that the Trustees in Bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel for the Committee of Creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the Trustees in bankruptcy in selecting the defendants as their counsel did so select them only after the defendants had filed a certificate substantially to the effect that from and after their appointment as counsel to the Trustees they were acting solely as such counsel and not as counsel for the Creditors' Committee or for any creditors.

47. They except to so much of the finding numbered "9" in the said Report as finds that the Trustees in bankruptcy knew of defendants' connection with plaintiff's assignor in relation to such creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that while the Trustees in bankruptcy know that the defendants had theretofore acted as counsel for the Creditors' Committee, they did not know of any alleged agreement or understanding between the defendants and plaintiff's assignor.

48. They except to so much of the finding numbered "10" [fol. 198] in the said Report as finds that after the appointment of the Trustees the defendants performed services together with the plaintiff's assignor and the firm of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that from and after the appointment of the defendants as counsel to the Trustees, any and all services performed by the defendants were so performed as counsel to the said Trustees and any and all services performed by the plaintiff's assignor and the firm of Guggenheimer, Untermyer & Marshall were so performed by them as attorneys and counsel to the Creditors' Committee.

49. They except to the finding numbered "11" in the said Report and to each and every part thereof upon the ground that the said finding and each and every part thereof is

against the weight of the evidence and without evidence to support it.

50. They except to the finding numbered "12" in the said Report and to each and every part thereof, upon the ground that the said finding and each and every part thereof is against the weight of the evidence and without evidence to support it.

51. They except to so much of the finding numbered "13" in the said Report as finds that any services rendered by the defendants after their appointment as Counsel to the Trustees were rendered pursuant to an agreement between the defendants and the plaintiff's assignor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have [fol. 199] found from the evidence that any and all services rendered by the defendants after their appointment as counsel to the Trustees were so rendered pursuant to such appointment and not pursuant to any agreement or understanding with the plaintiff's assignor.

52. They except to so much of the finding numbered "13" in the said Report as finds that any services rendered by the defendants after their appointment as counsel to the Trustees were rendered under the general supervision of the plaitniff's assignor and of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the services rendered by the defendants after their appointment as counsel to the Trustees were rendered under the supervision of the Trustees and of the Court and not under the supervision of the plaintiff's assignor or of the firm of Guggenheimer, Untermyer & Marshall.

53. They except to so much of the finding numbered "13" in the said Report as finds that the services rendered by the defendants after their appointment as counsel to the Trustees were rendered with the active aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the

evidence that any aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall after the appointment of the defendants as counsel [fol. 200] to the Trustees was only such aid, assistance and collaboration as plaintiff's assignor and Guggenheimer, Untermyer & Marshall rendered as attorneys and counsel to the Creditors' Committee and were in duty bound to render in their capacity as attorneys and counsel to the Creditors' Committee.

54. They except to so much of the finding numbered "13" in the said Report as finds that the allowances aggregating $142,659.98 were made solely for services in connection with the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the said allowances aggregating the said sum were in part for services in connection with the conservation of the assets of the bankrupt and the realization of large sums therefor and in part for services in connection with the general administration of the estate, including services in connection with contests on the claims of certain creditors.

55. They except to so much of the finding numbered "13" in the said Report as finds that a substantial part or any part of the services for which allowances were made to the defendants had been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the services for which the said allowances were made were performed by the defendants solely.

[fol. 201] 56. They except to so much of the finding numbered "14" in the said Report as finds that the demand made by plaintiff's assignor upon defendants on or about November 15, 1920 for 40% of the said sum of $142,659.98 was pursuant to any agreement between the plaintiff's assignor and the defendants, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the

evidence that when the said demand was first made it was plaintiff's assignor upon the ground of the relationship of corresponding attorneys and not upon the ground of any alleged agreement and only subsequently was the said demand placed upon the ground of any alleged agreement.

57. They except to so much of the finding numbered "15" in the said Report as finds that the defendants are now indebted to the plaintiff in the sum of $57,064, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and is contrary to law, and he should have found from the evidence that the defendants are not indebted to the plaintiff in any sum whatsoever.

58. They except to the conclusion numbered "1" in the said Report and to each and every part thereof, upon the ground that the said conclusion and each and every part thereof is contrary to the evidence and without evidence to support it and is contrary to the law, and he should have held that the defendants are not, and neither of them is, indebted to the plaintiff in any amount whatsoever.

59. They except to the conclusion numbered "2" in the said Report and to each and every part thereof, upon the [fol. 202] ground that the said conclusion and each and every part thereof is contrary to the evidence and without evidence to support it and is contrary to the law, and he should have held that judgment be directed in favor of the defendants together with the costs of this action, including the Referee's fees and stenographer's minutes.

And the defendants take the following exceptions to the Referee's allowance of the proposed findings of fact and conclusions of law submitted by the plaintiff, to wit:

60. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "4" as finds that the plaintiff's assignor was retained as attorney and counsel for a large number of creditors of Josiah V. Thompson upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

61. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "5" as

finds that plaintiff's assignor represented from 90% to 95% of the creditors of said Thompson, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

62. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "6" as finds that plaintiff's assignor acted under instructions of the creditors and for the benefit of all of the creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

[fol. 203] 63. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "6" as finds the plaintiff's assignor retained the defendants to conduct bankruptcy proceedings under his supervision, upon the ground that the said finding is against the weigh' of the evidence and without evidence to support it.

64. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "8" as finds that bankruptcy proceedings were instituted upon the understanding and agreement as aforesaid (meaning the understanding and agreement referred to in the proposed finding numbered "6"), upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

65. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "8" as finds that after appointment of the Trustees the defendants acted at the instance of plaintiff's assignor and for the creditors represented by plaintiff's assignor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

66. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "8" as finds that the interests of the creditors represented by the plaintiff's assignor were identical with those of the general creditors of the said Thompson, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

67. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "9" as finds

[fol. 204] that the Trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel for the Committee of Creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

68. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "9" as finds that the Trustees in bankruptcy know of defendants' connection with plaintiff's assignor in relation to such creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

69. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "10" as finds that after the appointment of the Trustees the defendants performed services together with the plaintiff's assignor and the firm of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

70. They except to the allowance by the Referee of the proposed finding of fact numbered "11" and to each and every part thereof, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

71. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "12" as finds that any services rendered by the defendants after their appointment as counsel to the Trustees were rendered pursuant to an agreement between the defendants and the [fol. 205] plaintiff's assignor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

72. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "12" as finds that any services rendered by the defandants after their appointment as counsel to the Trustees were under the general supervision of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

73. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "12" as finds that the services rendered by the defendants after their appointment as counsel to the Trustees were with the active aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

74. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "12" as finds that the allowances aggregating $142,659.98 were made solely for services in connection with the conservation of the assets of the bankrupt for the benefit of the creditors and the realization of large sums therefor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

75. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "12" as [fol. 206] finds that a substantial part or any part of the services for which allowances were made to the defendants had been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

76. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "13" as finds that the demand made by plaintiff's assignor upon defendants on or before November 15, 1920, for 40% of the said sum of $142,659.98 was pursuant to any agreement between the plaintiff's assignor and the defendants, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

77. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "14" as finds that the defendants are now indebted to the plaintiff in the sum of $57,064, upon the ground that the said finding is against the weight of the evidence and without evidence to support it and is contrary to the law.

78. They except to the allowance by the Referee of the proposed conclusion of law numbered "1" and to each

and every part thereof, upon the ground that the said conclusion and each and every part thereof is contrary to the evidence and without evidence to support it and is contrary to the law.

79. They except to the allowance by the Referee of the proposed conclusion of law numbered "2" and to each and every part thereof, upon the ground that the said conclu-[fol. 207] sion and each and every part thereof is contrary to the evidence and without evidence to support it and is contrary to the law.

And the defendants take the following exceptions to the Referee's refusals to find the Proposed Findings of Fact and Conclusions of Law submitted by the defendants, to wit:

80. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "4" as reads as follows:

"and it was given the same control thereof substantially as the prior owners had."

81. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "7."

82. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "8."

83. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "10."

84. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "11."

85. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "12."

86. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "13" as reads as follows:

[fol. 208] "The defendants duly accepted their said designation as general counsel to the said trustees, did not thereafter represent creditors except through said trustees, and proceeded to render services as such general counsel, and any and all services thereafter rendered by the defendants

in connection with the said Thompson estate were so rendered as such general counsel to the said trustees."

87. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "14" as reads as follows.

"It was to comply with this rule that the certification by the counsel appointed by the trustees referred to in the foregoing finding was made. At no time did the Court authorize the trustees of the Thompson estate, either specially or otherwise, to retain the said Untermyer or the firm with which he was associated as their attorney or counsel, and in truth and in fact, the said trustees at no time retained either the said Untermyer or the firm with which he was associated as their attorney or counsel."

88. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "15."

89. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "16."

90. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "18" as reads as follows:

[fol. 209] "it was further agreed between the defendants and the said Untermyer that out of the balance remaining after payment to the said associate counsel of their proportionate parts, so much thereof would be paid to the firm with which the said Untermyer was associated as the said Untermyer should designate."

91. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "19."

92. They except to the Referee's refusal to find, as proposed in defendants' proposed finding of fact numbered "20," that the sale of the bulk of the Thompson properties under the Young Option was abandoned.

93. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "21."

94. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "22."

95. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "23."

96. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "24."

97. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "25."

[fol. 210] 98. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "26."

99. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "27."

100. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "28" as reads as follows:

"When the said demand was first made it was placed upon the ground that the said Untermyer was entitled thereto because he had brought the defendants into the Thompson matter and had introduced the said business to the defendants and was entitled thereto because of the relationship of the parties as corresponding attorneys."

101. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "28" as reads as follows:

"Thereafter the said Untermyer demanded 40% of the said sum on the ground of an alleged agreement between him and the defendant Weil, whereby the defendants had agreed that, while general counsel to the trustee, they would act under the orders and directions of the said Untermyer, and had further agreed to pay over to the said Untermyer such proportion as he should fix and designate out of any allowances to be made and paid to the defendants as general counsel to the trustees."

[fol. 211] 102. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "28" as reads as follows:

"The defendants denied that any such agreement, express or implied, had ever been made and refused to pay

over to the said Untermyer any sum whatsoever on the basis of any such alleged agreement, and further contended that such an agreement, if made, would have been unprofessional, contrary to public policy, a fraud upon the Court, and null and void."

103. They except to the Referee's refusal to find, as proposed in defendants' proposed finding numbered "31," that the sums allowed and paid to the defendant Weil on or about November 30, 1921, and on or about May 10, 1924, were allowed and paid for services which did not include services in connection with any sales of the property of the bankrupt estate and had no reference to preventing disintegration of the estate.

104. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "32."

105. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "1."

106. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "2."

107. They except to the Referee's refusal to hold so much of the defendants' proposed conclusion of law numbered "3" as reads as follows:

[fol. 212] "The validity of such an agreement as that alleged and set forth in the complaint and in the amended complaint herein filed, and testified to by Mr. Untermyer to have been made between the said Untermyer and the defendants, regarding the division between the said Untermyer and the defendants of the fees to be allowed to the defendants as general counsel for the trustees, is to be determined not by what said parties did thereunder, but by the general tendency of such an agreement."

They except to the Referee's refusal to hold so much of the defendants' proposed conclusion of law numbered "3" as reads as follows:

"If that is opposed to the interests of the public, the agreement is void, even though in that particular case the intent of the parties may have been good and no injury to the public may have resulted."

They except to the Referee's refusal to hold so much of the defendants' proposed conclusion of law numbered "3" as reads as follows:

"It matters not that any particular contract is free from any taint of actual fraud, oppression or corruption."

They except to the Referee's refusal to hold so much of the defendants' proposed conclusion of law numbered "3" as reads as follows:

"The law looks to the general tendency of such contracts, and it closes the door to temptation by refusing them recognition in any of the courts of the country."

[fol. 213] They except to the Referee's refusal to hold so much of the defendants' proposed conclusion of law numbered "3" as reads as follows:

"It is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results."

108. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "4."

109. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "5."

110. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "5a."

111. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "6."

Dated New York, January 23, 1926.

Stein & Salant, Attorneys for Defendants. Office & P. O. address: 1328 Broadway, Borough of Manhattan, City of New York. Carter, Ledyard & Milburn, of Counsel for Defendants. Office & P. O. address: 54 Wall Street, Borough of Manhattan, City of New York.

[fol. 214] State of York,
County of New York,
City of New York, ss:

Samuel A. Fenchtwanger, being duly sworn, deposes and says that he is over the age of 18 years. That on the 26 day of February, 1926, at No. 120 B'way in the Boro. of Manhattan, City of New York, he served the foregoing Defendants' Exceptions upon Guggenheimer, Untermyer & Marshall, plaintiff's attorneys in this action, by delivering to and leaving personally with the managing clerk of said attorneys' office a true copy thereof.

Deponent further says that he knew the person served as aforesaid to be the person mentioned and described in —

Samuel A. Fenchtwanger.

Sworn to before me this 26 day of Feb., 1926. Marjorie Reddy, Notary Public, Queens County. Queens County Clk's No. 2098. New York Co. Clk's No. 692. Reg's No. 6025. Bronx Co. Clk's No. 47. Reg's No. 26321. Kings Co. Clk's No. 181. Reg's No. 6288. Commission expires March 30, 1926.

[fol. 215] In United States District Court

[Title omitted]

Order Granting Motion to Confirm Report of Referee—March 12, 1926

This cause having been referred to Allen Wardwell, Esq., as Referee to hear, try and determine the same, and the said Referee having rendered a report wherein he directed judgment in favor of the plaintiff for $57,964, with interest thereon from November 15, 1920, and for the costs and disbursements of the action, including the Referee's fees and stenographer's minutes, and the plaintiff having thereupon moved for an order confirming the report of the Referee and for judgment in accordance therewith, and said motion having thereupon been brought on for hearing before this Court,

Now, on reading and filing the notice of motion to confirm the said report and for judgment thereon dated February [fol. 216] 20, 1926, proof of due service thereof, the affidavit of Laurence A. Steinhardt verified February 20, 1926, referred to in said notice, the order of reference aforesaid and the stipulation on which the same was made, the report of the Referee dated January 13, 1926, the opinion rendered by him, the pleadings, including the amended pleadings, herein, and all of the proceedings theretofore had in this case, in support of the motion, and the defendants having submitted the order removing this case from the Supreme Court of the State of New York to this Court, the order substituting Messrs. Stein & Salant as attorneys for the defendants, the stenographer's minutes of the testimony taken before the Referee and the exhibits offered in evidence on the hearing before him, the defendants' exceptions to the Referees' opinion as submitted prior to the rendition of his report, the requests made to the Referee by the respective parties to pass upon proposed findings of fact and conclusions of law, and the findings made thereon the defendants' exceptions to the report of the Referee, to his allowance of the proposed findings of fact and conclusions of law submitted by the plaintiff, and to his refusals to find the proposed findings of fact and conclusions of law submitted by the defendants, and after hearing Louis Marshall, Esq., of counsel for the plaintiff, in support of the said motion, and Louis Salant, Esq., of counsel for the defendants, in opposition thereto, upon motion of Guggenheimer & Marshall, attorneys for the plaintiff, it is

Ordered, that said motion to confirm the report of the Referee be and the same is in all respects granted and that [fol. 217] judgment be entered herein in conformity with the said report in favor of the plaintiff and as against the defendants for the sum of $57,964, with interest thereon from November 15, 1920, and for the costs and disbursements of this action, including the Referee's fees and stenographer's minutes.

Henry W. Goddard, U. S. D. J.

[fol. 218] In United States District Court

[Title omitted]

Judgment

The above-entitled action having been referred to Allen Wardwell, Esq., as Referee to hear, try and determine the issues therein, and said Referee after hearing the parties has duly rendered his report herein in favor of the plaintiff and against the defendants for $57,064.00 with interest from November 15, 1920, together with the costs of this action, including the Referee's fees and stenographer's minutes, and the plaintiff having thereupon moved for an order confirming the report of the Referee and for judgment in accordance therewith and said motion having been granted, and the costs and disbursements of the plaintiff having been duly taxed in the sum of $5,666.60,

Now, on motion of Guggenheimer, Untermyer & Marshall, attorneys for the plaintiff, it is

Adjudged that Edward M. Neary, the plaintiff herein, recover of A. Leo Weil and Charles M. Thorp, the defendants [fol. 219] herein, the sum of $57,064.00 with interest from November 15, 1920, amounting to the sum of $18,260.48, together with the sum of $5,666.60 costs and disbursements as taxed, making in all the sum of $80,991.08, and that said plaintiff have execution therefor.

Dated New York, March 15, 1926.

Alex Gilchrist, Jr., Clerk of the United States District Court, Southern District of New York.

[fol. 220] In United States District Court

[Title omitted]

Petition for Writ of Error

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

Now come the defendants, A. Leo Weil and Charles M. Thorp, by Stein & Salant, their attorneys, and say, that

on the 15th day of March, 1926, this Court entered judgment herein in favor of the plaintiff and against the defendants, in which judgment and the proceedings prior thereto in this cause, certain errors were committed to the prejudice of the defendants, all of which will more fully appear from the Assignment of Errors which is filed with this petition.

Wherefore these defendants pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Second Circuit for the correction of the [fol. 221] errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and that all further proceedings may be suspended until the determination of the said writ of error by the said Circuit Court of Appeals.

Dated New York, June 10th, 1926.

Stein & Salant, Attorneys for Defendants. Office & P. O. Address: 1328 Broadway, Borough of Manhattan, New York City.

[fol. 222] In United States District Court

[Title omitted]

Order Allowing Writ of Error

Upon the annexed petition this day presented, it is

Ordered that the Writ of Error be allowed to A. Leo Weil and Charles M. Thorp, the petitioners and plaintiffs in error and the defendants in this suit, from the judgment of this Court entered the 15th day of March, 1926, in favor of the plaintiff Edward M. Neary and against the said defendants for the sum of $80,991.08, damages and costs, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the Second Circuit, and that a transcript of the record of this Court, including all of the exhibits offered in evidence by either party, be filed in

the United States Circuit Court of Appeals for the Second Circuit, according to law, as prayed for.

Dated New York, June 10, 1926.

Jno. C. Knox, United States District Judge for the Southern District of New York.

[fol. 223] In United States District Court

[Title omitted]

Assignments of Error

Now come the defendants by Stein & Salant, their attorneys, and say that in the record and proceedings in the above entitled action, and in the Referee's Proposed Report and Opinion (undated) filed herein, and in the Referee's Report filed herein dated January 13, 1926, containing the Findings of Fact and Conclusions of Law made by the Referee, and in the allowance by the Referee of certain of the proposed Findings of Fact and Conclusions of Law submitted by the plaintiff, and in the refusal of the Referee to find certain of the proposed Findings of Fact and Conclusions of Law submitted by the defendants, all as confirmed by the Court by its order dated the 12th day of March, 1926, and in entering the judgment dated March 15, 1926, upon the said order, there is manifest error upon which defendants will rely in a prosecution of the writ of error in the above entitled cause in the following particulars:

1. The Court erred in confirming the Report of the Referee as to the Findings of Fact and Conclusions of Law made by him.

[fol. 224] 2. The Court erred in directing that judgment be entered in conformity with the said Report in favor of the plaintiff and against the defendants.

3. The Court erred in entering judgment in favor of the plaintiff and against the defendants.

4. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the plaintiff's as-

signor was retained as attorney and counsel for a large number of creditors of Josiah V. Thompson. (Finding of Fact numbered "4" in Referee's Report dated January 13, 1926.)

5. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that plaintiff's assignor represented from 90% to 95% of the creditors of said Thompson. (Finding of Fact numbered "5" in Referee's Report dated January 13, 1926.)

6. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that in determining to institute bankruptcy proceedings plaintiff's assignor acted under instructions of the creditors and for the benefit of all of the creditors of the said Thompson. (Finding of Fact numbered "6" in Referee's Report dated January 13, 1926.)

7. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that plaintiff's assignor retained the defendants to conduct such bankruptcy proceedings under his supervision. (Finding of Fact numbered "6" in Referee's Report dated January 13, 1926.)

[fol. 225] 8. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that bankruptcy proceedings were instituted upon the understanding and agreement aforesaid (meaning the understanding and agreement referred to in Finding numbered "6"). (Finding of Fact numbered "8" in Referee's Report dated January 13, 1926.)

9. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that after the appointment of the Trustees and in the administration of the Thompson Estate in the bankruptcy proceedings, the defendants acted at the instance of plaintiff's assignor and for the creditors represented by plaintiff's assignor. (Finding of Fact numbered "8" in Referee's Report dated January 13, 1926.)

9a. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the interests of the creditors represented by the plaintiff's assignor were identical with those of the general creditors of the said

Thompson. (Finding of Fact numbered "8" in Referee's Report dated January 13, 1926.)

10. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the Trustees in Bankruptcy, in selecting the defendants as their counsel, realize that they were selecting for that position counsel of the committee of creditors. (Finding of Fact numbered "9" in Referee's Report dated January 13, 1926.)

12. The Referee erred in finding, and the Court erred in [fol. 226] confirming and adopting the finding, that in the course of the administration of the Estate of the said Thompson and after the appointment of the Trustees, the defendants performed services together with the plaintiff's assignor and the firm of Guggenheimer, Untermyer & Marshall. (Finding of Fact numbered "10" in Referee's Report dated January 13, 1926.)

13. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the plaintiff's assignor and the defendants agreed that they should perform any services together after the appointment of the Trustees. (Finding of Fact numbered "11" in Referee's Report dated January 13, 1926.)

14. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that it was mutually agreed that plaintiff's assignor and defendants should collaborate, after the appointment of the Trustees, in rendering such services as were necessary and proper in the bankruptcy proceedings for the conservation of the Estate and the protection of the creditors of the bankrupt. (Finding of Fact numbered "11" in Referee's Report dated January 13, 1926.)

14a. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that it was mutually agreed that the defendants were to receive for the services to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the Court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him. (Find-

ing of Fact numbered "11" in Referee's Report dated January 13, 1926.)

[fol. 227] 15. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that there was an agreement between the plaintiff's assignor and the defendants applying to fees for services rendered after the appointment of the Trustees, in connection with the preservation of the bankrupt's estate against forced sales by mortgagees, judgment creditors and other lienors and the sale of the properties of the estate. (Finding of Fact numbered "12" in Referee's Reptort dated January 13, 1926.)

16. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that any services rendered by the defendants after their appointment as Counsel to the Trustees were rendered pursuant to an agreement between the defendants and the plaintiff's assignor. (Finding of Fact numbered "13" in Referee's Report dated January 13, 1926.)

17. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that any services rendered by the defendants after their appointment as counsel to the Trustees were rendered under the general supervision of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall. (Finding of Fact numbered "13" in Referee's Report dated January 13, 1926.)

18. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the services rendered by the defendants after their appointment as counsel to the Trustees were rendered with the active aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall. (Finding of Fact num-
[fol. 228] bered "13" in Referee's Report dated January 13, 1926.)

19. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the allowances aggregating $142,659.98 received by the defendants were made solely for services in connection with the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor. (Find-

ing of Fact numbered "13" in Referee's Report dated January 13, 1926.)

20. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that a substantial part or any part of the services for which allowances were made to the defendants had been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall. (Finding of Fact numbered "13" in Referee's Report dated January 13, 1926.)

21. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the determination made by the plaintiff's assignor on or about November 15, 1920 that 40% of the said sum of $142,659.98 should be paid to him, was pursuant to any agreement between the plaintiff's assignor and the defendants. (Finding of Fact numbered "14" in Referee's Report dated January 13, 1926.)

21a. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the defendants refused to pay plaintiff's assignor any part of the sum of $142,659.98. (Finding of Fact numbered "15" in [fol. 229] Referee's Report dated January 13, 1926.)

22. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the defendants are now indebted to the plaintiff in the sum of $57,064. (Finding of Fact numbered "15" in Referee's Report dated January 13, 1926.)

23. The Referee erred in holding, and the Court erred in confirming and adopting the holding, that the defendants are indebted to the plaintiff for 40% of the sum of $142,659.98, to wit: $57,064.00 with interest thereon from November 15, 1920. (Conclusion of Law Numbered "1" in Referee's Report dated January 13, 1926.)

24. The Referee erred in holding, and the Court erred in confirming and adopting the holding, that judgment should be directed in favor of the plaintiff against the defendants. (Conclusion of Law numbered "2" in Referee's Report dated January 13, 1926.)

25. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "4" as finds that the plaintiff's assignor was retained as attorney and counsel for a large number of creditors of Josiah V. Thompson.

26. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "5" as finds that plaintiff's assignor represented from 90% to 95% of the creditors of said Thompson.

[fol. 230] 27. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "6" as finds that in determining to institute bankruptcy proceedings, plaintiff's assignor acted under instructions of the creditors and for the benefit of all of the creditors of the said Thompson.

28. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "6" as finds that plaintiff's assignor retained the defendants to conduct such bankruptcy proceedings under his supervision.

29. The Referee erred in allowing so much of plaintiff's proposed Findings of Fact numbered "8" as finds that bankruptcy proceedings were instituted upon the understanding and agreement aforesaid (meaning the understanding and agreement referred to in the proposed Finding numbered "6").

30. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "8" as finds that after the appointment of the Trustees and in the administration of the Thompson Estate in the bankruptcy proceedings the defendants acted at the instance of plaintiff's assignor and for the creditors represented by plaintiff's assignor.

31. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "8" as finds that the interests of the creditors represented by the plaintiff's assignor were identical with those of the general creditors of the said Thompson.

32. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "9" as finds that the [fol. 231] Trustees in Bankruptcy in selecting the defend-

ants as their counsel realized that they were selecting for that position counsel of the Committee of Creditors.

33. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "9" as finds that the Trustees in Bankruptcy, in selecting the defendants as their counsel, knew of defendants' connection with plaintiff's assignor in relation to such creditors.

34. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "10" as finds that in the course of the administration of the Estate of the said Thompson and after the appointment of the Trustees, the defendants performed services together with the plaintiff's assignor and the firm of Guggenheimer, Untermyer & Marshall.

35. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "11" as finds that plaintiff's assignor and the defendants agreed that they should perform any services together after the appointment of the Trustees.

36. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "11" as finds that it was mutually agreed that plaintiff's assignor and the defendants should collaborate, after the appointment of the Trustees, in rendering such services as were necessary and proper in the bankruptcy proceedings, for the conservation of the estate and the protection of the creditors of the bankrupt.

[fol. 232] 36a. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "11" as finds that it was mutually agreed that the defendants were to receive for the services to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the Court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him.

37. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "12" as finds that any services rendered by the defendants after their appoint-

ment as counsel to the Trustees were rendered pursuant to an agreement between the defendants and the plaintiff's assignor.

38. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "12" as finds that any services rendered by the defendants after their appointment as counsel to the Trustees were rendered under the general supervision of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall.

39. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "12" as finds that the services rendered by the defendants after their appointment as counsel to the Trustees were rendered with the active aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall.

40. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "12" as finds that [fol. 233] the allowances aggregating $142,659.98 received by the defendants were made solely for services in connection with the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor.

41. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "12" as finds that a substantial part or any part of the services for which allowances were made to the defendants had been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall.

42. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "13" as finds that the determination made by the plaintiff's assignor on or about November 15, 1920, that 40% of the said sum of $142,659.98 should be paid to him, was pursuant to any agreement between the plaintiff's assignor and the defendants.

42a. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "14" as finds that the defendants refused to pay plaintiff's assignor any part of the sum of $142,659.98.

43. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "14" as finds that the defendants are now indebted to the plaintiff in the sum of $57,064.

44. The Referee erred in holding in accordance with plaintiff's proposed Conclusion of Law numbered "1" that the defendants are indebted to the plaintiff for 40% of the sum of $142,659.98, to wit: the sum of $57,064 with interest thereon from November 15, 1920.

[fol. 234] 45. The Referee erred in holding in accordance with plaintiff's proposed Conclusion of Law numbered "2" that judgment should be directed in favor of the plaintiff against the defendants.

46. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "4" that the Creditors' Committee was given substantially the same control of the claims of the unsecured creditors which were deposited with it as the prior owners had.

47. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "7," that on or about August 21, 1917, Samuel Untermyer, acting for and on behalf of the Creditors' Committee, informed the defendant A. Leo Weil of the facts substantially set forth in the defendants' proposed Findings numbered "3," "4," and "6."

48. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "7," that the said Untermyer informed the said Weil that he had concluded to institute bankruptcy proceedings against the said Thompson, but that he did not expect the bankruptcy proceedings to be protracted because he hoped and expected that the Young Option would be carried out and if carried out, it would not be necessary to have an adjudication, in any event, if carried out, it would assure a composition in bankruptcy that would be satisfactory to all the creditors.

49. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered [fol. 235] "7," that the said Untermyer thereupon on said day (i. e., on or about August 21, 1917) retained the defend-

ants in behalf of the said Creditors' Committee, and the said defendants accepted the said retainer, to institute bankruptcy proceedings against the said Thompson, secure an adjudication in bankruptcy, to act for said Creditors' Committee in the bankruptcy proceedings, which said Untermyer wanted instituted, and in the meanwhile to obtain injunctions and to institute such other proceedings as might be necessary, proper or advisable to prevent the disintegration of the Thompson estate.

50. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "7," that the agreement made between the said Untermyer and the said Weil on or about August 21, 1917, and the retainer of the defendants by the said Untermyer on or about said date, were limited, at the time they were made, to the following specific purposes, to wit: To institute bankruptcy proceedings against the said Thompson, to secure an adjudication in bankruptcy, to act for said Creditors' Committee in the bankruptcy proceedings which said Untermyer wanted instituted, and in the meanwhile to obtain injunctions and to institute such other proceedings as might be necessary and proper or advisable to prevent the disintegration of the Thompson estate; and the Referee erred in refusing to find, in accordance with the said proposed Finding, that the said agreement and retainer included no other purposes or objects.

51. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered [fol. 236] "7," that it was further agreed between the said Untermyer and the said Weil on or about August 21, 1917, that the defendants would perform the said services under the supervision and direction of the said Untermyer for a fee of Five thousand ($5,000.00) Dollars, or any other sum that the said Untermyer might decide to be fair and reasonable, said fee to be paid to the defendants by the said Creditors' Committee.

52. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "8," that thereupon and pursuant to the said agreement and retainer, the defendants duly instituted proceedings in involuntary bankruptcy against the said Thompson in the

United States District Court for the Western District of Pennsylvania and at or about the same time duly obtained various injunctions and instituted various other proceedings against creditors of the said Thompson to prevent the foreclosure of mortgages, attachments and other liens and to prevent the disintegration of the said Thompson estate.

53. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact number "10," that a large amount of labor was performed by the defendants in the rendition of the services aforesaid and it was thereupon agreed between the said Untermyer and the defendants some time in the month of September, subsequent to the said adjudication in bankruptcy, but prior to the appointment of any trustees in bankruptcy, that the defendants should not be limited to a fee of $5,000 for the said services.

[fol. 237] 54. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "11", that the agrement between the said Untermyer and the defendants referred to in the plaintiff's proposed Finding of Fact No. 7, and the modification thereof referred to in the defendants' proposed Finding of Fact numbered "10", were the only agreements regarding fees made between the said said Untermyer and the defendants until after the consummation of the Frick sale.

55. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "12", that the said agreement and modification thereof was an agreement for the retainer of the defendants on behalf of the Creditors' Committee, that the defendants' actions were to be subject thereunder to the said Untermyer's directions as counsel of said Creditors' Committee, and that the defendants were to receive as compensation for their services to the Creditors' Committee such amount as the said Untermyer should see fit.

56. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "12", that when the said agreement and modification were made, there was no provision as to who the trustee or trustees in bankruptcy were to be, and there was no arrange-

ment as to who was to be counsel for the trustee or trustees.

57. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "12", that when the said agreement and modification were made, it was expected that the sale of the entire property [fol. 238] (except the bank building) under the Young Option would go through promptly and that the trustees and their counsel would not have much to do, except to consummate the Young (or so-called Hill) sale.

58. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "13", that the defendant, after accepting their designation as general counsel to the trustees in bankruptcy, did not represent creditors except through said trustees.

59. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "13", that the defendants, after their designation as general counsel to the trustees in bankruptcy, proceeded to render services as such general counsel, and any and all services thereafter rendered by the defendants in connection with the Thompson Estate were so rendered as such general counsel to the said trustees.

60. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "14", that the certification by the counsel appointed by the trustees, referred to in the defendants' proposed Finding of Fact numbered "13", was for the purpose of complying with Rule 5 of Rules in Bankruptcy of the District Court of the United States for the Western District of Pennsylvania.

61. The referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "14", that at no time did the Court authorize the trustees [fol. 239] of the Thompson estate, either specially or otherwise, to retain the said Untermyer or the firm with which he was associated as their attorney or counsel, and that in truth and in fact, the said trustees at no time retained either the said Untermyer or the firm with which he was associated as their attorney or counsel.

62. The Referee in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "15", that upon the designation of the defendants as general counsel to the trustees, the employment of the defendants by the said Untermyer to act under his direction for the said Creditors' Committee came to an end and terminated, and said defendants did not undertake thereafter in any manner to act for said Creditors' Committee.

63. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "16", that at the time of the designation of the defendants as general counsel to the Trustees as aforesaid, there was no agreement or understanding between the said Untermyer and the defendants, express or implied, that the defendants were to be so designated as general counsel to the Trustees, nor was there at said time an agreement or undertaking between them, express or implied, that the defendants, while general counsel to the Trustees, would act under the supervision or direction of the said Untermer, nor was there at said time any agreement or understanding between them, express or implied, that the defendants would pay over to the said Untermyer any part of the fees to be allowed and paid to them as such general counsel.

[fol. 240] 64. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "18", that upon the consummation of the Frick sale, it was agreed between the defendants and the said Untermyer that out of the balance remaining from the counsel fees to be allowed out of the proceeds of the said sale for services rendered in connection therewith, after payment to the associate counsel of their proportionate parts, so much thereof would be paid to the firm with which said Untermyer was associated as the said Untermyer should designate.

65. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "19", that after the joint petition and application for counsel fees in connection with the Frick sale was presented in the names of the defendants, of the associate counsel to the trustees, and of the firm with which the said Untermyer was

associated, the Court awarded to the said joint petitioners upon their said joint petition and application the sum of $40,000 out of the proceeds of the Frick Sale for their services in connection therewith and the sum of $17,000 thereof was agreed upon as the amount to be paid to the associate counsel, leaving a balance of $23,000 for distribution between the defendants and the said Untermyer or his firm.

66. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "19", that the defendants repeatedly requested the said Untermyer to fix and designate the proportion of the said sum of $23,000 that he desired to be paid to the firm with [fol. 241] which he was associated, but the said Untermyer did not do so and has not done so.

67. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "19", that the defendants have not demanded from the said Untermyer or from the said Creditors' Committee compensation for the services rendered by the defendants prior to their designation as general counsel to the trustees, and the defendants have received no compensation for their said services.

68. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "20", that the sale of the bulk of the Thompson properties under the Young Option was abandoned.

69. The Referee erred in refusing to find, in accordance with Defendants' proposed Finding of Fact numbered "21", that in or about the month of May, 1918, a serious personal disagreement occurred between the said Untermyer and the defendant Weil, arising out of matter not connected with the Thompson estate, of such nature as to make further personal relations between them impracticable and impossible, and it was thereupon agreed between the said Untermyer and the defendant Weil that they and their respective firms should have no further professional relationship of any kind with each other.

70. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered

[fol. 242] "22", that the administration in bankruptcy of the Thompson Estate continued in regular course, and further sales of small portions of estate known as the Rockwell and Dorsey Sales were negotiated and made by the trustees, and in or about the month of June, 1919, the sale of the entire remainder of the said estate, constituting the bulk thereof, was made by the trustees to the Piedmont Coal Company under a contract approved, among others, by the said Creditors' committee and by the said Untermyer, whereby it was provided that the purchasers, in addition to paying to the trustees the purchase price therein named, would also pay to the said Creditors' Committee in full for the services of the said Creditors' Committee and of the said Untermyer as its counsel prior to the bankruptcy and for such assistance as the Creditors' Committee and its said counsel had rendered to the trustees since the adjudication in bankruptcy, an amount not exceeding the sum of $360,000.

71. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "22", that the contract of purchase and sale with the Piedmont Coal Company was duly ratified and approved by the said District Court, and the purchasers did thereupon pay to the said Creditors Committee, pursuant thereto, the greater part of the said sum of $360,000 and will pay the balance thereof upon the fulfillment of certain conditions in said contract of purchase and sales specified.

72. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered [fol. 243] "23", that at no time did the defendants or either of them make any agreement with the said Untermyer, for the payment to the said Untermyer, or to his firm, of any part of the fees allowed or to be allowed to the defendants as general counsel to the trustees, excepting the agreement with respect to the fees allowed for joint services in connection with the Frick sale.

73. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "24", that after the election and appointment of the trustees in bankruptcy, the Creditors' Committee continued to act and to function, and the said Untermyer continued to

act as counsel to the said Creditors' Committee, and the professional services rendered by said Untermyer and the firm of Guggenheimer, Untermyer and Marshall with which he was connected, and his and their associates, were rendered for and on account of said Creditors' Committee and for and on account of the claims upon the bankrupt estate which had been assigned by creditors to said Creditors' Committee, and not as counsel or attorneys for said Trustees.

74. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "25," that any services rendered by the said Untermyer or Guggenheimer, Untermyer and Marshall, the firm with which he was associated, after the appointment of the trustees, were so rendered by him and them as counsel and attorneys of the Creditors' Committee, and that the said Untermyer agreed to accept as compensation for the said services rendered after the appointment of the trustees and for [fol. 244] such services as he and they rendered prior to the bankruptcy, such sum as he and the Creditors' Committee might agree upon out of the sum of $360,000 stipulated in the said Piedmont Coal Company contract.

75. The Referee erred in refusing to find in accordance with the defendants' proposed Finding of Fact numbered "26," that the claims of the creditors who had deposited their claims with and assigned same to the Creditors' Committee were filed with the Trustees by the Creditors' Committee through the said Untermyer as its counsel.

76. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "26," that many of the said claims were objected to and contested by the trustees and their counsel, whereupon the said Creditors' Committee, through the said Untermyer, nevertheless, insisted upon retaining possession of and title to the said claims and upon defending the regularity of the deposit and assignment thereof to the Creditors' Committee and the regularity of the filing proofs of the said claims by the Creditors' Committee with the trustees, but left the prosecution of the said claims on the merits otherwise to personal counsel selected by such creditors;

a number of said claims so contested were rejected in whole or in part.

77. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "27," that other creditors who had deposited their claims with and assigned them to the Creditors' Committee sought to withdraw the same from the Creditors' Committee and [fol. 245] to make independent proof in their own names of their said claims before the trustees, but the Creditors' Committee through the said Untermyer opposed such action on the part of the said creditors.

78. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "28," that when the said Untermyer's demand was first made that the defendants pay over to him 40% of the sum of $142,659.98, it was placed upon the ground that the said Untermyer was entitled thereto because he had brought the defendants into the Thompson matter and had introduced the said business to the defendants and was entitled thereto because of the relationship of the parties as corresponding attorneys.

79. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "28," that thereafter the said Untermyer demanded 40% of the said sum on the ground of an alleged agreement between him and the defendant Weil, whereby the defendants had agreed that, while general counsel to the trustees, they would act under the orders and directions of the said Untermyer, and had further agreed to pay over to the said Untermyer such proportion as he should fix and designate out of any allowances to be made and paid to the defendants as general counsel to the trustees.

80. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "28," that the defendants denied that any such agreement, express or implied, had ever been made and refused to pay [fol. 246] over to the said Untermyer any sum whatsoever on the basis of any such alleged agreement, and further contended that such an agreement, if made, would have

been unprofessional, contrary to public policy, a fraud upon the Court, and null and void.

81. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "31," that the sum of $21,000 allowed and paid to the defendant Weil on or about November 30, 1921, and the further sum of $23,333.31 allowed and paid to the defendant Weil on or about May 10, 1924, were allowed and paid for services which did not include services in connection with any sales of the property of the bankrupt estate, and had no reference to preventing disintegration of the estate.

82. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "32," that there is no substantial evidence in this case to support a judgment on the issues involved herein in favor of the plaintiff.

83. The Referee erred in refusing to hold, in accordance with the defendant's proposed Conclusion of Law numbered "1," that there was no agreement made by the defendants with Samuel Untermyer, or with the firm with which said Untermyer was associated for the division of any allowances made for services rendered to the trustees in bankruptcy, saving and excepting the agreement between defendants and the firm with which the said Untermyer was associated, to wit, the firm of Guggenheimer, Untermyer & Marshall, for the division of fees allowed for services in connection with the Frick Sale.

[fol. 247] 84. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law numbered "2", that the alleged agreement set forth in the complaint and in the amended complaint herein and claimed by the plaintiff to have been made between the said Untermyer and the defendants regarding the division between the said Untermyer and the defendants of the fees allowed to the defendants as general counsel to the trustees, was unprofessional, contrary to public policy, illegal, null and void.

85. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law numbered "3", that the validity of such an agreement as that

alleged and set forth in the complaint and in the amended complaint herein filed, and tesified to by Mr. Untermyer to have been made between the said Untermyer and the defendants, regarding the division between the said Untermyer and the defendants of the fees to be allowed to the defendants as general counsel for the trustees, is to be determined not by what said parties did thereunder, but by the general tendency of such an agreement.

86. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law numbered "3," that if an agreement is opposed to the interests of the public, the agreement is void, even though in that particular case the intent of the parties may have been good and no injury to the public may have resulted.

87. The Referee erred in refusing to hold, in accordance with the defendant's proposed Conclusion of Law num- [fol. 248] bered "3", that it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption, that the law looks to the general tendency of such contracts, that closes the door to temptation by refusing them recognition in any of the courts of the country, and that it is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results.

88. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law numbered "4", that when such a contract or agreement as that alleged in the complaint or the amended complaint filed in this case, or in the testimony of the plaintiff, is brought to the attention of the Court, it is the duty of the Court to refuse to enforce such contracts or agreements, for the protection of the administration of justice, regardless of how it may affect the interests of either party to said attempt to enforce said agreement, whether plaintiff or defendant.

89. The Referee erred in refusing to hold, in accordance with the defendant's proposed Conclusion of Law numbered "5", that the alleged agreement set forth in the complaint and in the amended complaint herein and claimed by the plaintiff to have been made between the said Unter-

myer and the defendants regarding the division between the said Untermyer and the defendants of the fees allowed to the defendants as general counsel to the trustees, was vague, indefinite and unenforceable.

90. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law num- [fol. 249] bered "5a", that there is no substantial evidence in this case to support a judgment on the issues involved herein in favor of the plaintiff.

91. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law numbered "6", that the complaint should be dismissed upon the merits, and the judgment should be entered accordingly.

92. The Referee erred in finding and stating in his proposed Report and Opinion that a contract substantially as alleged by the plaintiff did exist.

93. The Referee erred in finding and stating in his proposed Report and Opinion that "this arrangement" (meaning thereby the arrangement made between Samuel Untermyer and the defendants in August and September, 1917, "could properly be applied to fees subsequently allowed to the trustees if in dealing with such fees the parties subsequently understood and interpreted the agreement to apply to such fees."

94. The Referee erred in finding and stating in his proposed Report and Opinion that the defendant Weil's subsequent correspondence with Mr. Marshall constitutes an admission of the receipt by him of Mr. Wickwire's letter of April 26, 1918, Plaintiff's Exhibit 133; whereas he should have found from the evidence that the said letter of Mr. Wickwire, dated April 26, 1918, Plaintiff's Exhibit 133, was not received by the defendant.

95. The Referee erred in finding and stating in his Proposed Report and Opinion that the defendant Weil's letter [fol. 250] to Mr. Untermyer, dated May 7, 1918, Plaintiff's Exhibit 144, cannot be limited to the construction that the said letter referred only to the Frick fees.

96. The Referee erred in finding and stating in his Proposed Report and Opinion that the language of the said letter dated May 7, 1918, Plaintiff's Exhibit 144, is far broader than the fixing of the allowances in connection with the Frick sale and refers to a general arrangement between the parties, but the particular application of this arrangement is to the Frick fees.

97. The Referee erred in finding and stating in his Proposed Report and Opinion that at the time of the writing of the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, no special arrangement had yet been made as to the fixing of the Frick fees.

98. The Referee erred in finding and stating in his Proposed Report and Opinion that the agreement referred to by the defendant Weil in the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, could only be the agreement made prior to the appointment of the Trustees, which Mr. Weil now interprets to refer to compensation allowed by the Trustees.

99. The Referee erred in finding and stating in his Proposed Report and Opinion that the defendant's Weil recognition of the distinction between the compenstion allowed to Mr. Untermyer directly in which he (the said Weil) has no interest, and Mr. Untermyer's interest in the fees allowed to counsel to the Trustees, disposes of the contention made by Mr. Weil in respect to the compensation to [fol. 251] the counsel of the Creditors' Committee allowed upon the consummation of the Piedmont sale.

100. The Referee erred in finding and stating in his Proposed Report and Opinion that the relations between the said Untermyer and his firm on the one hand and the defendants on the other hand were not broken off so far as the Thompson case was concerned by the correspondence which took place between the said Untermyer and the defendant Weil in May, 1918.

101. The Referee erred in finding and stating in his Proposed Report and Opinion that the agreement made between the said Untermyer and the said Weil by their mutual correspondence in May, 1918, that they and their respective firms should have no further relations, did not ap-

ply to the Thompson case, or if it did, it was not carried into effect.

102. The Referee erred in finding and stating in his Proposed Report and Opinion that the parties by their correspondence just cited (meaning the correspondence which took place in April and May, 1918) mutually agreed and understood that the original agreement was meant to and did apply to fees to be received by defendants as counsel for the Trustees.

103. The Referee erred in finding and stating in his Proposed Report and Opinion that there was an agreement between the plaintiff (meaning the said Untermyer) and the defendant with respect to the distribution of the fees re- [fol. 252] ceived by the defendants as counsel to the Trustees in the Thompson Estate and that such agreement was that the amount of such fees, when received, should be divided in such manner as Mr. Untermyer should determine, and that this agreement covered the period from the beginning of the bankruptcy proceedings until the time when the properties were sold, and applied to all fees received by the defendants from the trustees during that period.

104. The Referee erred in finding and stating in his Proposed Report and Opinion that the alleged agreement claimed by the plaintiff was predicated upon the services rendered and to be rendered in connection with the preservation of the state against foreclosures of secured liens and the making of contracts for the sale of the property which would be advantageous to the unsecured creditors.

105. The Referee erred in finding and stating in his Proposed Report and Opinion that there was nothing necessarily illegal or contrary to public policy in the arrangement as claimed by the said Untermyer and as construed by the said Referee.

106. The Referee erred in finding and stating in his Proposed Report and Opinion that there was no conspiracy or plan to bring about the appointment of any special Trustee, nor to collect claims for that purpose, nor to provide for the appointment of counsel for a Trustee to be elected.

107. The Referee erred in finding and stating in his Proposed Report and Opinion that the interests which the said Untermyer represented were not adverse to the general creditors.

[fol. 253] 108. The Referee erred in finding and stating in his Proposed Report and Opinion that the Trustees seem to have gone out of their way to select counsel who already represented a large number of creditors and that the defendants were Untermyer's representatives with respect to those creditors who had deposited their claims with the Creditors Committee.

109. The Referee erred in finding and stating in his Proposed Report and Opinion that Mr. Weil did not at the time he was appointed counsel to the Trustees disclaim that he was acting on behalf of the Creditors Committee.

110. The Referee erred in finding and stating in his Proposed Report and Opinion that Mr. Weil wrote to Mr. Untermyer that he considered himself to have been appointed as Mr. Untermyer's representative and testified that he considered that he continued to represent those interests until the Young-Hill deal fell through.

111. The Referee erred in finding and stating in his Proposed Report and Opinion that the Trustees appear to have forestalled any complication on this ground (meaning the ground that the defendants were counsel to the Creditors Committee) by joining with the counsel for the Creditors Committee two other counsel, one of whom, Judge Umbel, represented other creditors and the other had at one time acted for the Creditors Committee.

112. The Referee erred in finding and stating in his Proposed Report and Opinion that there was no reason to pre- [fol. 254] sume when the contract was made, nor as it was subsequently interpreted, that there would be any adverse interest between the Creditors Committee and the creditors who had not deposited their claims with the Creditors Committee.

113. The Referee erred in finding and stating in his Proposed Report and Opinion that the defendants were on the ground and it was their duty to call the attention of the

Court to the arrangement (meaning the arrangement as claimed by the plaintiff) which they had had with the plaintiff (meaning the said Untermyer) if that was necessary.

114. The Referee erred in finding and stating in his Proposed Report and Opinion that if the agreement which the plaintiff made applied, as the Referee believes it did, to fees other than the fees in the Frick sale, it was the defendants' duty to do whatever was necessary to bring that matter to the attention of the Court.

115. The Referee erred in finding and stating in his Proposed Report and Opinion that if the defendant understood, as the Referee believes he should have understood, that his arrangement with Mr. Untermyer applied to subsequent fees he could and should have insisted that the subsequent applications to which the agreement applied should have been made upon the plaintiff's (meaning the said Untermyer's) behalf as well as on behalf of the other counsel.

116. The Referee erred in finding and stating in his Proposed Report and Opinion that there was nothing in the original arrangement which was not susceptible of being le- [fol. 255] gally carried out, and that if it was the defendant's fault that any appropriate steps were not taken to inform the Court of those facts, he cannot now be heard to plead that failure in his own behalf.

117. The Referee erred in finding and stating in his Proposed Report and Opinion that Weil and Thorp availed themselves to a large extent of the plaintiff's assistance and services in connection with the Thompson Estate, which cannot be considered as rendered on behalf of the Creditors Committee as distinguished from the creditors as a whole.

118. The Referee erred in finding and stating in his Proposed Report and Opinion that the interests of the Creditors Committee were not adverse to those of the general creditors and that the Creditors Committee did not take a position adverse to the general creditors.

119. The Referee erred in finding and stating in his Proposed Report and Opinion that at the time the agreement was made there was nothing intended by the arrangement which would be adverse to the creditors, whether repre-

sented by the Committee or not, nor was there any reason to suppose that any such condition would arise, nor in fact did any such condition arise.

120. The Referee erred in finding and stating in his Proposed Report and Opinion that the potential diversity of interest, arising from the fact that in the proof of claims it might be the duty of the Trustees to object to the claims of the Creditors Committee, would apply to Mr. Weil himself, who did not cease to represent the Creditors Com- [fol. 256] mittee upon his appointment as counsel to the Trustees.

121. The Referee erred in finding and stating in his Proposed Report and Opinion that the only objection to the alleged contract as claimed by the plaintiff and as found by the Referee was that it does not seem in terms to have been made known to the Court or to the Referee in Bankruptcy.

122. The Referee erred in finding and stating in his Proposed Report and Opinion that there is no reason to suppose that had the plaintiff or the defendant called the attention of the Court to the alleged arrangement as claimed by the plaintiff and as found by the Referee there would have been any objection to the plaintiff sharing in these fees.

123. The Referee erred in finding and stating in his Proposed Report and Opinion that certainly the Court's or the Referee's (meaning the Referee in Bankruptcy) ignorance of the agreement did not tend to increase the allowances to counsel.

124. The Referee erred in finding and stating in his Proposed Report and Opinion that the plaintiff (meaning the plaintiff's assignor Samuel Untermyer) bore a considerable part in the performance of the services rendered to the estate by counsel for which the Referee and the Court commended counsel.

125. The Referee erred in finding and stating in his Proposed Report and Opinion that the defendants cannot now contend that the failure to bring this matter to the attention of the Court on subsequent allowances, as they did on the Frick sale, can be put forward to defeat the plaintiff's contention.

[fol. 257] 126. The Referee erred in finding and stating in his Proposed Report and Opinion that no such situation existed in the present case as in the case of Marshall v. Maires, 203 App. Div. 646.

127. The Referee erred in finding and stating in his Proposed Report and Opinion that the alleged agreement as claimed by the said Untermyer and as found by the Referee was not vague, indefinite and unenforcible.

128. The Referee erred in finding and stating in his Proposed Report and Opinion that the plaintiff is entitled to recover 40% of the amounts received by the defendants from the Trustees up to and including the allowances made in connection with the Piedmont sale.

129. The Referee erred in finding and stating in his Proposed Report and Opinion that the plaintiff is entitled to recover from the defendants the sum of $57,064 with interest from November 15, 1920.

Wherefore, defendants pray that the judgment of the said District Court of the United States for the Southern District of New York be reversed, and that the District Court be directed either to grant a new trial in said cause, or to dismiss the complaint and enter judgment in favor of the defendants on the merits.

Dated New York, June 10th, 1926.

Stein & Salant, Attorneys for Defendants, 1328 Broadway, Borough of Manhattan, City of New York.

[fols. 258 & 259] Bond on writ of error for $250.00 approved; omitted in printing.

[fol. 260] Citation, in usual form, omitted in printing.

[fols. 261 & 262] Clerk's certificate to foregoing transcript omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

A. LEO WEIL and CHARLES M. THORP, Doing Business under the Firm Name and Style of Weil & Thorp, Plaintiffs-in-error,

against

EDWARD M. NEARY, Defendant-in-error

Before Manton, L. Hand, and Swan, Circuit Judges

Writ of error to the District Court for the Southern District of New York. Action by the plaintiff to recover from the defendants for breach of contract. A referee's report in favor of the plaintiff was confirmed by the District Court. Defendants appeal. Affirmed.

Stein & Salant, Esqs., Attorneys for Plaintiffs-in-Error. George W. Wickersham, Esq., John G. Milburn, Jr., Esq., of Counsel.

Louis Marshall, Esq., Counsel for Defendant-in-Error.

MANTON, Circuit Judge:

Josiah V. Thompson, a resident of Uniontown, Pa., engaged in business as a banker and operator of coal mines, became financially involved in 1915. His properties were mortgaged for 19 million dollars and he owed unsecured creditors 15 million more. Samuel Untermyer, an attorney of New York City, was consulted to advise Mr. Thompson in his difficulties. Proceedings were taken in the Pennsylvania State Courts, resulting in the appointment of equity receivers. The appointment of such receivers was revoked by a decision of the Supreme Court of that state and they were discharged and the suit dismissed in 1917. To prevent foreclosure of the mortgages, a petition in bankruptcy was filed, resulting in an adjudication on September 10, 1917.

The plaintiffs-in-error, attorneys at law of Pittsburgh, Pa., were retained by Mr. Untermyer to conduct the bankruptcy proceedings. This retainer was found below to be

an agreement to pay them $5,000 for their services. At the time the defendants below had no interest in nor had they any connection with Thompson or his estate or his creditors. It was found below that Mr. Untermyer was the person most conversant with the affairs of the bankrupt and represented creditors whose interests were identical with those of the general creditors. The trustees in bankruptcy retained the defendants below, by order of the court, and large allowances were subsequently made to them for their services.

In this action, the plaintiff below seeks to recover 40% of such allowances. It was found below that the affairs of the estate were very complicated. It was found that the trustees in bankruptcy "in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendants' connection with plaintiff's assignor in relation to such creditors." Further, that it was recognized that the original retainer of the defendants below on a basis of $5,000 was wholly inadequate for the services necessary and in lieu of the compensation thus originally stipulated "it was mutually agreed that plaintiff's assignor and defendants should collaborate in rendering such services as were necessary and proper in such bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt and that the defendants were to receive for the services so to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him." It was further found that under the general supervision and with the active aid, assistance and collaboration of the assignor of the plaintiff below and his firm who acted for him, services were rendered resulting in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor by the trustees in bankruptcy upon the sale thereof, for which allowances were made in bankruptcy proceedings to an aggregate amount received by the defendants below of $142,658.88. And further, "a substantial part of the services for which

said allowances were made having been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him." It was also found that, pursuant to the agreement to determine the division of the allowances made, the assignor of the plaintiffs below determined that the defendants below should retain 60% and pay 40% to him. Notice of such determination was served upon the defendants below.

The claim was assigned by Mr. Untermyer to the present plaintiff. After issue was joined, the matter was referred to a referee "to hear, try and determine the issues and with all the powers to act and rule upon the said trial possessed by the court," and he reported in favor of the plaintiff below, which was confirmed by the court below and from a judgment entered thereon this writ of error has been allowed.

No bill of exceptions was filed and the case is here for review on the judgment roll only. David Lupton & Sons v. Automobile Club, 225 U. S. 489; Demotte v. Whybrow, 263 Fed. 366; Steger v. Orth, 258 Fed. 619. On motion, the bill of exceptions was stricken out because it was not served in time, but the application to dismiss the writ was denied. The application to dismiss is now renewed and is denied. On this review we are at liberty to examine the complaint, answer, findings below and the judgment entered thereon. No stipulation was signed waiving a jury as provided by Sec. 649 of the Revised Statutes. Therefore, by virtue of Sec. 700 of the Revised Statutes, the defendant below is not accorded a right to review the rulings on the law of the court, during the progress of the trial of the cause. Nor are the findings of fact a subject for our review. Fleischmann Co. v. United States, 270 U. S. 349; Duigan v. United States, 274 U. S. 195; Law v. United States, 266 U. S. 494. In the Duigan case, supra, in referring to Secs. 649 and 700 of the Revised Statutes, the court, referring to Sec. 649, said:

"Its purpose and effect, when read together with Sections 648 and 700, is to define the scope of appellate review in actions at law without a jury. Unless there is a written stipulation waiving a jury, there can be no review of the rulings on questions of law in the course of the trial or

of the sufficiency of a special finding to support the judgment."

The findings of fact sufficiently support the cause of action pleaded. But it is argued that the complaint, as a matter of law, fails to establish a cause of action. The complaint alleges the agreement as found by the court below and as set forth above. Also that the services of the defendants below were to be rendered under the direction of the assignor of the plaintiff below. At the time of the appointment of the defendants below as attorneys for the trustees, Rule 5 of the Rules of Bankruptcy for the District Court for the Eastern District of Pennsylvania, where the bankruptcy proceedings were pending, was in force and effect. It reads:

"Attorney for the Estate and His Duties.—Unless especially authorized by the Court, Receivers and Trustees in Bankruptcy shall not retain as their attorney the attorney of the bankrupt, of the petitioning creditor, of the person applying for the appointment of a Receiver, or of any creditor, and trustees shall not retain as their attorney any attorney who has obtained proxies or voted upon the election of such trustees or who is the attorney for persons holding such proxy."

The argument is that the contract between the parties is against public policy and is illegal and void. This is based upon the claim that it violated the rule referred to; also that it subjected the attorneys for the trustee to the supervision of the assignor of the plaintiff below, who was neither trustee nor attorney to the trustee, and entitled him to compensation allowed by the court for legal services to the trustee in such amount as he may deem just and equitable which, it is said, was contrary to public policy. It is urged upon us that we must, therefore examine the agreement with the closest scrutiny, because it violates the court's control and supervision over the services of attorneys and trustees. Allowances to attorneys for trustees is a matter for the court's determination and it alone has power to fix the compensation and to order its payment out of assets in possession of the trustees. Whether an agreement is opposed to the interest of public

policy is to be determined by its tendency. If it is opposed to the interest of the public, the agreement is void even though in a particular case the intent of the parties may have been good and no injury to the public has resulted. Woodstock Iron Co. v. Richmond etc. Extension Co., 129 U. S. 643; Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261; Sampliner v. Motion Picture Patents Co., 255 Fed. 242. The attitude of the courts toward compensation of attorneys, receivers and trustees of a bankrupt estate may be inferred from Rule XLII of the Supreme Court Rules effective April 13, 1925, subsequent to this allowance. That rule requires attorneys, receivers and trustees seeking an allowance of compensation from a bankrupt estate for the services rendered, to file a petition under oath setting forth not only the statement of services and the amount claimed therefor, but it shall be accompanied by an affidavit of the applicant stating that no agreement has been made directly or indirectly and no understanding exists for a division of fees between the applicant and the receivers, the trustees in bankruptcy or the attorney of any of them, and in the absence of such petition and affidavit, no allowance of compensation shall be made.

But the burden of establishing an agreement to be illegal or against public policy rests upon the person asserting it, and the court will only declare a contract void as against public policy when the case is clear and free from doubt and an injury to the public is substantial, not theoretical and problematical. Hobbs v. McLean, 117 U. S. 567; Oregon R. R. & Navigation Co. v. Dumas, 181 Fed. 781; Richards v. Weiner Co., 207 N. Y. 59; Curtis v. Gokey, 68 N. Y. 300. It is apparent that the parties to this agreement, as found, in retaining the services of the assignor of the plaintiff below, had in mind subserving the interests of the creditors. It was to be expected that Mr. Untermyer, representing 95% of the unsecured creditors and having been in the litigation from the outset as advisor to the bankrupt, could render substantial services on behalf of the creditors and would be useful to conserving the assets out of which dividends might be paid to them. It was he who retained the defendants below. The defendants below

represented no creditors or creditors' committees. They were free to accept assignment as attorneys for the trustee and to represent them. It was not unlawful for them to retain Mr. Untermyer as counsel and thus to obtain competent help in the common effort to bring to the trustees the assets of the estate. In re Champion Wagon Co., 193 Fed. 1004; In re Baber, 119 Fed. 520; In re Abram, 103 Fed. 272; In re Stotts, 93 Fed. 438. Such an agreement is not contrary to public policy. The purpose of Rule V and of the rule of the Supreme Court was not to prevent such employment. It was designed to avoid attorneys actively searching for professional employment in bankruptcy proceedings at their inception and later obtaining their assignment as attorneys for trustees. It was an abuse which sprang from such professional conduct which gave rise to the rule. At no time was an allowance made by the court to Mr. Untermyer, who came within the provisions of Rule V if he applied to the court for compensation. As stated, the finding below is that the defendants below realized that when they were agreeing with Mr. Untermyer for his services, they were consulting counsel for the committee of creditors and knew of his connection in relation to such creditors. His services were accepted; no objection was made to them when tendered. While it is the general rule that a receiver should not employ an attorney for either party to the suit in which he is appointed, and the same rule applies to trustees, it is only where the trustee is actively adverse to one of the parties that there is any impropriety in employing as counsel one who bore such relationship. In re Smith, 203 Fed. 369. At no time did Mr. Untermyer seek compensation from the bankrupt's estate for services rendered and thus come within Rule 5 of the General Orders of Bankruptcy promulgated by the Supreme Court. The defendants below having accepted the cooperation and collaboration of Mr. Untermyer, they had it within their right to pay therefor and to pay out of the compensation allowed to them for the services rendered to the trustees in the course of the administration of the bankrupt's estate. There is no valid objection to attorneys sharing their fees with counsel employed. We must accept the finding establishing the agree-

ment and therefore the promise to pay. Indeed, by statute the right of attorneys and counselors to divide compensation received by them is recognized. Subdiv. 2 of Sec. 274 of the New York Penal Law; Matter of Fitzsimmons, 174 N. Y. 15; Sciolaro v. Asch, 137 App. Div. 667.

The Supreme Court in Watkins v. Sedberry, 261 U. S. 571, overruled objections to an allowance of compensation for services rendered upon an agreement whereby the attorney undertook to recover property belonging to the estate and indemnified the trustee against damages and expenses, and the trustee agreed that any property so recovered should be chargeable with the expenses incurred by the attorney, and the balance to be equally divided between them. The court said that the contract was not on its face unenforceable, was not malum in se, and that the attorney could recover on a quantum meruit. Indeed, it is found below that a substantial part of the services for which allowances were made were performed by the assignor of the plaintiff below. By this agreement the expenses to the estate were not increased and the services inured to the benefit of the estate. The case relied upon by the defendants below—Maguire v. Corwine, 101 U. S. 108—was an action for services by the plaintiff in the U. S. Treasury Department which had designated him as special counsel in prize cases, which restricted him to the selection of a man who was familiar with admiralty practice. Plaintiff entered into the contract with the defendant whereby, in consideration of his procuring the latter's appointment as special counsel, he agreed to pay the plaintiff one-half of the fees which he might receive from the government. This was properly held to be a breach of special duty as well as of trust imposed in the plaintiff. In Marshall v. Maires, 203 App. Div. 646, affirmed 236 N. Y. 516, the terms of compensation were said to have been made by the attorneys for the bankrupt as a consideration for two things, (a) the election of trustees who would appoint the defendant their attorney, and (b) the defendant's appointment by them of such attorneys. This was held to be an illegal agreement. And in Fried v. Danziger, 120 App. Div. 604, the promise of compensation was by a firm of attorneys representing creditors in involuntary bankruptcy proceedings to divide fees with creditors

and the plaintiff claimed that he was entitled to his share of the fees received by the attorney and the number of creditors who were his clients. There the plaintiff had caused a petition in bankruptcy to be filed. The agreement provided for the discontinuance of the bankruptcy proceedings and the continuance of an action previously brought for the distribution of the bankrupt's assets. The agreement was held to be illegal.

But it is argued that the agreement to divide the compensation awarded for the services of the defendants below is so vague and indefinite as to be unenforceable. Allowing Mr. Untermyer to determine what was fair and equitable did not make the agreement vague or indefinite. His judgment was to prevail but it could not be arbitrary or capricious; it was to be fair and equitable. Such agreements are enforceable. Goltra v. Weeks, 271 U. S. 536; Sweeney v. United States, 109 U. S. 618; Ripley v. United States, 223 U. S. 695; Sullivan Co. v. Wingerath, 203 Fed. 460; Robinson v. United States, 251 Fed. 461. The compensation of the defendants below was fixed by the court and the promise of the defendants below was to divide a fair and equitable share with Mr. Untermyer, as determined by him. He having acted and determined what was fair and reasonable, it was sufficient upon which to base liability. No complaint is made that the division is capricious or arbitrary. Such an agreement was neither vague nor indefinite. Londenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298; Klipstein v. Allen, 123 Fed. 992; Jenkins v. Anaheim Sugar Co., 247 Fed. 958; Solter v. Leedom & Worrel Co., 252 Fed. 133; Burgess Fibre Co. v. Broomfield, 180 Mass. 283.

We think a legal and enforceable contract was pleaded and is established by the findings below. The judgment is therefore affirmed.

Judgment affirmed with costs.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York,

on the 19th day of December, one thousand nine hundred and twenty-seven.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

A. Leo Weil and Charles M. Thorp, Doing Business under the Firm Name and Style of Weil & Thorp, Plaintiffs in Error,

v.

Edward M. Neary, Defendant in Error

Error to the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M., L. H.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. A. Leo Weil and another v. Edward M. Neary. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 19, 1927. William Parkin, clerk.

United States of America,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from — to —, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of A. Leo Weil and Charles M. Thorp, doing business under the firm

name and style of Weil & Throp, Plaintiffs in Error, against Edward M. Neary, Defendant in Error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of January, in the year of our Lord one thousand nine hundred and twenty-eight, and of the Independence of the said United States the one hundred and fifty-second.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 276] SUPREME COURT OF THE UNITED STATES

Order Allowing Certiorari—Filed March 19, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,188. U. S. Circuit Court of Appeals, Second Circuit. Term No. 736. A. Leo Weil and Charles M. Thorp, doing business under the firm name and style of Weil & Thorp, petitioners, vs. Edward M. Neary. Petition for writ of certiorari and exhibit thereto. Filed February 2nd, 1928. File No. 33,188.

(722)